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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

INSTRUCTURE, INC., a Delaware corporation,
 	
          Plaintiff,
 	
vs.
 	
CANVAS TECHNOLOGIES, INC., a Delaware corporation, ,
 	
          Defendant.
	SUPPLEMENTAL DECLARATION OF STEVE DALY IN SUPPORT OF INSTRUCTURE'S REPLY TO PRELIMINARY INJUNCTION MOTION
	
	[REDACTED VERSION FOR PUBLIC FILING]
	
	Civil No. 2:21-cv-00454-DAK-CMR
	Judge Dale A. Kimball
	Magistrate Judge Cecilia M. Romero

I, STEVE DALY, declare as follows:

1.   I am the Chief Executive Officer of Instructure, Inc. ("Instructure"), the Plaintiff in the above captioned action. I submit this supplemental declaration (the "Supplemental Declaration") in support of Instructure's Motion for Preliminary Injunction (the "Motion"). I am fully familiar with the facts set forth in this declaration from personal knowledge or from

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documents that I have reviewed. If called as a witness, I could and would testify competently under oath to the facts contained herein.

2. On August 17, 2021, I submitted a declaration in support of Instructure's preliminary injunction motion (my "Initial Declaration"). *See* ECF No. 14. My Initial Declaration is incorporated herein by this reference.

3. I have reviewed Defendant Canvas Technologies, Inc.'s ("Defendant") Opposition to Instructure's Motion for Preliminary Injunction that Defendant submitted on September 1, 2021 as Document No. 27 in the above-captioned case (the "Opposition" or "Opp.").

4. I submit this Supplemental Declaration because, in its Opposition, Defendant makes a number of statements about Instructure's business that are completely inaccurate, highly misleading, and mischaracterize the true nature of Instructure's business. I submit this Declaration to respond to these mischaracterizations and to set the record straight.

A. **Instructure Does Not Claim Infringement Based on Defendant's Operation of a Job Board.**

5. Instructure claims infringement based on Defendant's operation of an interactive cloud-based platform that allows higher education students to create an online profile by uploading information that can then be shared with prospective employers and others for the purposes of showcasing students' experiences, accomplishments, and skills, networking with other students, seeking a job, and career enhancement. Instructure began offering this service to higher education students in July of 2010 through its Canvas ePortfolio product, and has continuously offered this service since then under the Canvas mark. Although Defendant began offering this service under the Jumpstart mark in 2017, it rebranded to Canvas in May of 2021. Thus, at the time that Defendant began offering its interactive platform to higher education students under the name

Canvas, Instructure had already been offering the same service under the Canvas mark for almost 11 years.

6.   I understand that Defendant claims priority with respect to the Canvas mark based on what it calls the "Canvas Job Board," for which Defendant claims a date of first use of July 18, 2013. Opp. at 4. According to Defendant, the Concierge Alliance of Napa Valley and Sonoma, which sometimes goes by the acronym "canvas," hosts the job board on its website at jobs.conciergeallieance.com.[1] Because this job board expressly states that it is "for Job Providers and Job Seekers ***in Napa and Sonoma***" (*See* Opp. at p. 5 (emphasis added)), I will refer to it as the "California Job Board."

7.   Even assuming that Defendant can demonstrate that it actually has trademark rights to Canvas in connection with the California Job Board, its claim to priority based on the California Job Board is highly perplexing to me because neither of the parties' respective Canvas platforms is a job board. I do not see the relevance of the California Job Board because neither party operates a job board. A job board is simply not at issue in this case.

8.   In essence, I understand a job board to be a website that displays job openings. The concept is similar to the help wanted section of a newspaper or a bulletin board upon which employers would advertise job openings and/or applicants would post résumés, except that in today's world a job board is online. The Cambridge Business English Dictionary, for example, defines a job board as "an online service that employers use to advertise jobs." JOB BOARD | definition in the Cambridge English Dictionary. Based on my understanding of job boards, a job board

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[1] The Concierge Alliance uses "canvas" as an acronym for "**C**oncierge **A**lliance of **N**apa **V**alley and **S**onoma."

is largely static, with little or no functionality beyond searching for jobs and uploading limited information such as a résumé or cover letter, and permits only very limited or no customization by job applicants or interaction between prospective employers and job applicants.

9.   The California Job Board, as I understand it and as explained by Concierge Alliance and by Defendant, is a job board as defined in the preceding paragraph. Both the Concierge Alliance and Defendant expressly call the California Job Board a "job board." The Concierge Alliance states on its website that the job board allows users to "post jobs and/or resumés [sic]." Opp. at 5. Essentially, the California Job Board merely allows applicants to upload basic information, such as a résumé and cover letter, and to peruse and apply for the jobs posted on the job board.

10.   Neither Defendant nor Instructure provide a job board.

11.   Defendant does not market its services as a job board. I have not seen any advertisements that describe Defendant's Canvas platform as a "job board," and the words "job board" appear nowhere on Defendant's Canvas website. In a press release issued on May 24, 2021, Defendant stated that its platform allows users to "paint the story of their life & career to get discovered for who they are and how they want to uniquely represent themselves." ECF 14-24 (Exh. 24 to Initial Declaration) at 6. This functionality, interactivity, and customization are not found in typical job boards, including the California Job Board. Defendant also expressly advertises on its website that, with the Canvas platform, applicants are "*no longer just a name and resume in a company's database*," (*i.e.*, they are not on a job board):

> ## Stand out for who you are.
>
> Own your data and manage how you show up in
> your job search so you're no longer just a name
> and resume in a company's database.

https://www.canvas.com/candidates (emphasis added). Finally, in a June 21, 2021, interview, the

CEO of Canvas, Ben Herman, expressly stated that Canvas is not "a job board":

> **Can you post jobs as well?**
>
> Yeah, you can post jobs. But we're not really a job board, we're
> more about managing the people who come to that job and
> automating that process.

See ECF 14-21 (Exh. 21 to Instructure's Preliminary Injunction Motion) at 5.

12.   Similarly, Instructure has never provided a job board. As described in more detail

below, continuously since July of 2010, Instructure has provided an interactive cloud-based

platform that allows higher education students to create an online profile (which Instructure calls

an "ePortfolio") by uploading information that can then be shared with other students and with

prospective employers for the purpose of showcasing a students' experiences, accomplishments,

and skills, networking with other students, seeking a job, and career enhancement.

B.   **Instructure has Offered its Canvas ePortfolio Service to University Students Since at Least July of 2010.**

13.   An e-Portfolio, also known as an electronic portfolio, is essentially a way to upload,

showcase, and share an individual's achievements and accomplishments in one place online.

14.   In 2010, when Instructure launched its Canvas learning management system

("LMS"), the use of eportfolios as a recruiting or job placement tool was getting growing attention

in Higher Education. For example, I've attached hereto as **Exhibit A** an article with the title "E-

Portfolios as a Hiring Tool: Do Employers Really Care?" published by Educause Quarterly in 2008. The article reports that 56% of employer-respondents stated that they planned to use eportfolios in the future, and concluded that "[h]igher education clearly has an opportunity to promote e-portfolios as a time-saving and cost-effective recruitment tool for recruiters." *See* Exhibit A at 13.

15.   In recognition of this, almost immediately after launching Canvas in 2010, Instructure began offering its users the ability to create ePortfolios.[2]

16.   For example, on July 13, 2010, Instructure published a YouTube video called "Overview of Instructure Canvas." *See* Overview of Instructure Canvas - YouTube. The following screenshot taken from the video shows the Canvas platform as it appeared on July 13, 2010. As can be seen in the screenshot, the Canvas ePortfolio tool was available on Canvas at that time:

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[2] The importance of eportfolios as a tool for Higher Education students to find employment continued to grow over the next several years. In April of 2013, the Association of American Colleges and Universities published an article with the title "It Takes More than a Major: Employer Priorities for College Learning and Student Success." I've attached a copy of this article hereto as **Exhibit B**. The article reports that "[i]n addition to a résumé and college transcript, a large majority of employers say an electronic portfolio demonstrating a student's work and key skill and knowledge areas would be very useful in evaluating potential candidates for hire." Exhibit B at 11. Further, a study conducted by the Educause Center for Analyses and Research found that "seven times as many students reported using eportfolios in 2012 to facilitate academic success as compared to 2010 (52% versus 7%)." *See* **Exhibit C**.
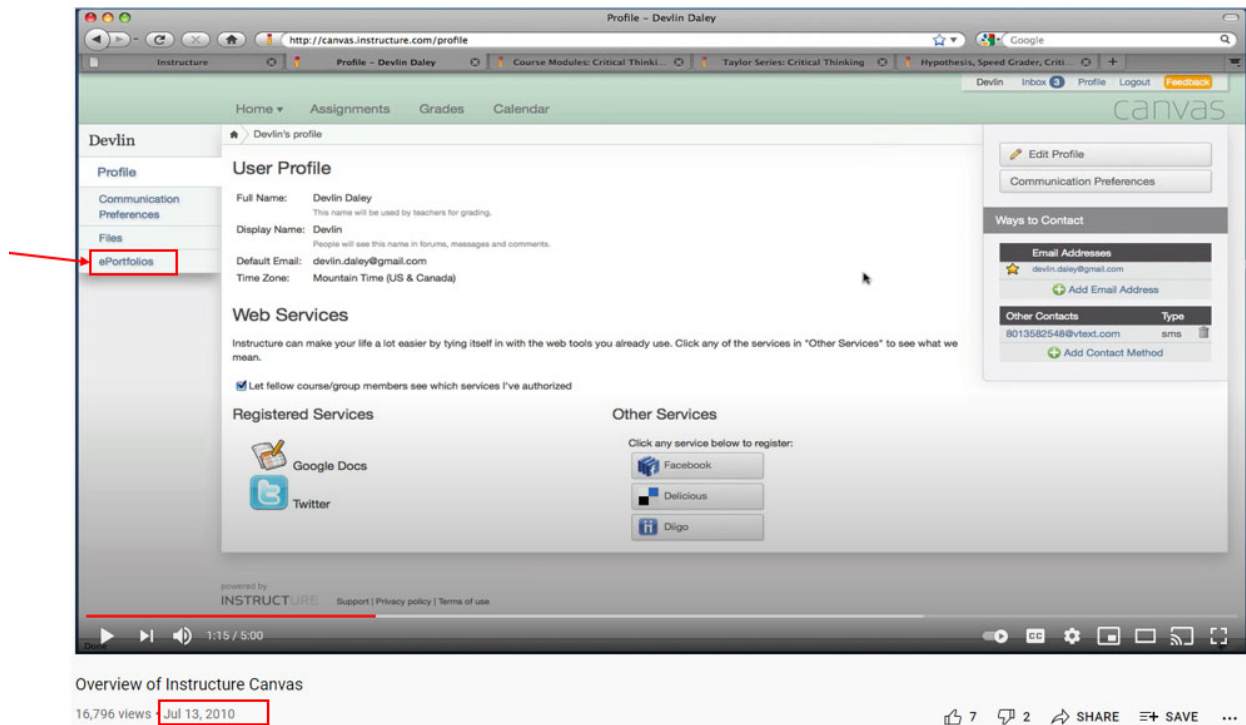
Id. at 1:15.[3]

17.   As another example, the following screenshot shows a Wayback Machine capture of Instructure's website from February 1, 2011. As the screenshot shows, as of February of 2011, Instructure actively offered and marketed its Canvas ePortfolios on its website:

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[3] Unless otherwise noted, I have added the red arrows and other notations to many of the screenshots in this Supplemental Declaration to emphasize relevant portions of the screenshots.

See https://web.archive.org/web/20110201232158/http://www.instructure.com/.
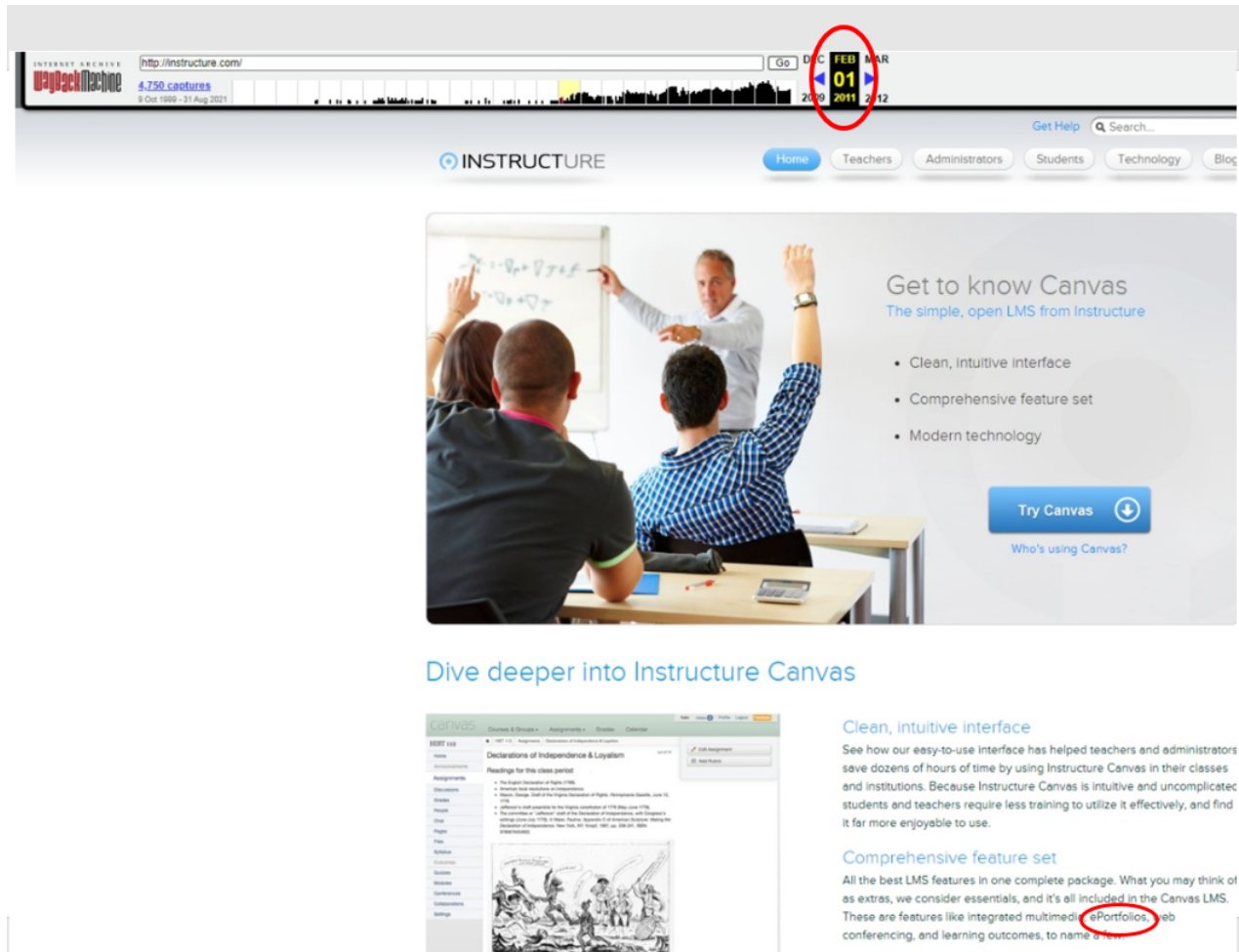
18.   As shown in the July 2010 screenshot in paragraph 16 above, Instructure has at all relevant times prominently featured its Canvas ePortfolio tool as a default feature in the Canvas platform. Thus, unless an institution chose to disable the ePortfolio feature, every Canvas user since July 2010 has had the ePortfolio tool in their Canvas account and the ability to create a Canvas ePortfolio. As a result, tens of millions of Higher Education students have been exposed to the Canvas ePortfolio feature over the past decade, and millions of Higher Education students

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have created a Canvas ePortfolio.[4]

C.   Canvas ePortfolio is Not a Learning Management System and Students Used Canvas ePortfolio Outside the Canvas LMS.

19.   Defendant argues that Instructure's services under the Canvas mark prior to 2019 were "limited to its online learning management system." Opp. at 7. This is not true.

20.   Although Instructure offers its Canvas ePortfolios to users as an integrated part of the Canvas learning management system ("LMS"), eportfolios are not learning management systems. I think that Wikipedia defines learning management systems and eportfolios relatively well. Wikipedia defines an LMS as "a software application for the administration, documentation, tracking, reporting, automation, and delivery of educational courses, training programs, or learning and development programs." *See* https://en.wikipedia.org/wiki/Learning_management_system. Wikipedia defines an eportfolio as "a collection of electronic evidence assembled and managed by a user, usually on the web." *See* https://en.wikipedia.org/wiki/Electronic_portfolio.

21.   There are well-established differences between an LMS and an eportfolio. The main differences between an LMS and an eportfolio is ownership and control. In an educational setting, the learning management system is "owned" and controlled by the university or instructor who decides things such as who has access and what tools are turned on or off. By contrast, the student "owns" and controls all aspects of his or her own eportfolio, which is not tied to any particular course. The student decides who can view her eportfolio and the contents of the eportfolio. Typically, a student loses access to the LMS when courses end, whereas eportfolios

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[4] There are currently 30 million Canvas users worldwide. Of those 30 million users, nearly ▮ ▮ of them are Higher Education students.

remain the property of the students after finishing their coursework and students have the ability to download their eportfolios and can continue to use and share them after graduation.

22.   Although Instructure's Canvas ePortfolio is an available feature within a user's Canvas account on the Canvas LMS, ePortfolios are not tied to the LMS or to any specific course. Rather, they are associated with the user. In other words, ePortfolios follow the user and not the course. Canvas ePortfolios belong to the student and not to Instructure or the school. For example, I've attached as **Exhibit D** a presentation from May of 2013 that provides some information on how Canvas ePortfolios work. Slide number 3, titled "What is Canvas ePortfolio?," states that "[i]n Canvas, student ePortfolios remain active as long as the student is in the institution's SIS and maintains a school log-in, they will have access to their ePortfolio ***even after they graduate***. Canvas also offers the opportunity for the students to download their ePortfolio to a zip file." *Id.* at 3 (emphasis added). As Instructure advised universities, students have the ability to access ePortfolios after graduation, including by saving "ePortfolios as .zip files for portability, enabling users to extract and upload the ePortfolio content to their Facebook, LinkedIn, blog, computer, or personal web pages." *See* **Exhibit E** (excerpt of Instructure's 2012 response to the University of Central Florida's RFP).

23.   Canvas ePortfolios are not learning management systems, and it is not correct to classify ePortfolio as an LMS simply because it is integrated into the Canvas platform. Further evidencing the fact that eportfolios are separate and distinct from learning management systems, there are many standalone eportfolio providers that are not connected to any LMS. In fact, Portfolium is one such standalone eportfolio provider that, until Instructure acquired it in 2019, was not affiliated with any LMS. As discussed in more detail below, Portfolium is simply an

extension, and a more sophisticated version, of the Canvas ePortfolios that Instructure has offered its users since 2010.
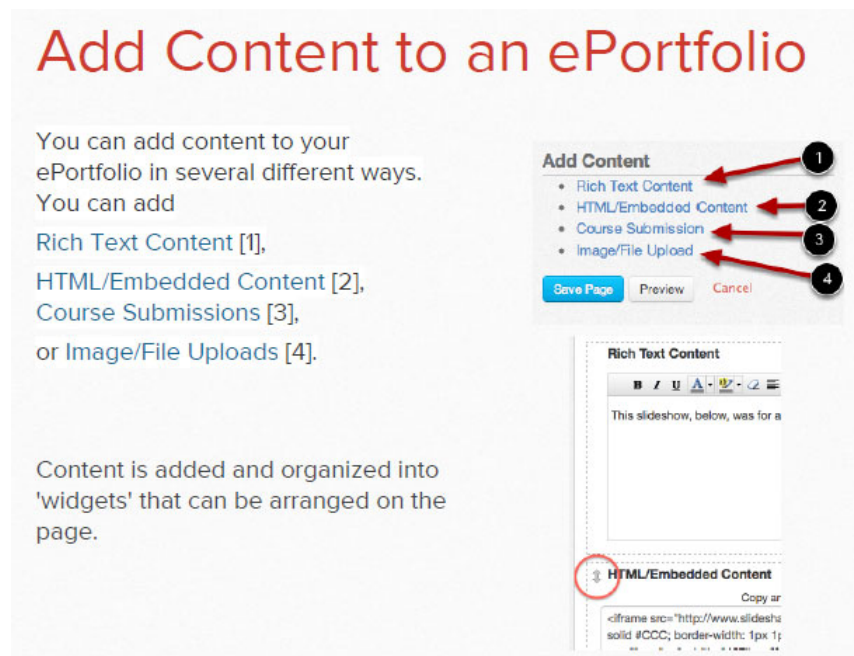
D.   Canvas ePortfolios Go Well Beyond Coursework.

24.   Defendant claims that Canvas ePortfolio is a tool that is only used by students to organize and share their coursework with classmates and teachers. *See* Opp. at 8 ("the Canvas ePortfolio product is described as *a tool used by students to organize their coursework* and, if made public . . ., *to allow students to share some of their work to their classmates and teachers*") (emphasis added). This is a gross mischaracterization of Canvas ePortfolio.

25.   Although Canvas users can certainly include notable coursework in their ePortfolios, the functionality and purpose of Canvas ePortfolios goes well beyond coursework. Users can and do fully customize their ePortfolios to include any information they want to present, including biographical information, photographs, videos (including YouTube videos), résumés, letters of recommendation, certificates, writing samples, journals, blogs, essays, artistic works, and even hyperlinks to other websites, including the student's LinkedIn profile or personal website.[5] Slide 6 in Instructure's May 2013 presentation on Canvas ePortfolios shows that the available options for adding content to a user's ePortfolio goes well beyond "course submissions":

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[5] Prior to 2019, Canvas users could include within their Canvas ePortfolio a hyperlink to their LinkedIn profile. When Instructure acquired Portfolium in 2019, it removed the integration with LinkedIn from its Canvas ePortfolios.

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Exh. D at 6.[6]

26.   Instructure offers Canvas ePortfolio to higher education institutions as a tool *expressly in order to go beyond coursework*. For example, in December of 2011, Instructure submitted a response to an RFP issued by the Solano Community College District. I've attached an excerpt of Instructure's RFP response to this Supplemental Declaration as **Exhibit F**. In its RFP, the college asked:

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[6] In addition to having common law rights to Canvas for these services going back to at least July of 2010, the ePortfolio services fit squarely within Instructure's Registration No. 4,080,698 for the Canvas mark which claims a first use in May of 2012:

> "Application service provider (ASP) featuring software to enable uploading, posting, showing, displaying tagging, blogging, sharing or otherwise providing electronic media or information over the internet or other communications network . . . ."

See ECF 14-2 (the '435 Registration is attached as Exh. 2 to my Initial Declaration). An Application Service Provider is simply a company or organization that provides software applications to customers over the internet.

> "[a]s more learning begins to happen ***outside the LMS***, teachers must learn new ways to identify and assess that interaction. How does your proposed solution give teachers and learners the flexibility to collaborate ***beyond the course*** in the LMS, while also offering a safe place for exploration, communication, and record-keeping?"

Id. at 111-12 (emphasis added). In response, Instructure pointed to its ePortfolio service, explaining that "[o]ur ePortfolio tool, as described above, provides a way for learner-owned organization and showcasing of artifacts and work if they don't have their own website or blog." *Id*. at 112.

27.   As another example, in June of 2011, Instructure submitted its response to an RFP issued by Bowling Green State University. A true and correct excerpt from this response is attached hereto as **Exhibit G**. The University stated that a priority for the school was for students to have the ability "to customize/design the e-portfolio for a variety of purposes, from learning to showcase. Easy-to-use templates and designs." *Id*. at 37. In response, Instructure advised the school that "Canvas does not impose any predefined structure or organization to the design and creation of ePortfolios. Students are free to develop and drag-and-drop any type of content in any order that best meets their requirements and individual preferences." *Id*.

E.   Since July of 2010, Instructure has Marketed Its Canvas ePortfolio as a Recruiting Tool to Tens of Millions of Higher Education Students.

28.   Defendant also claims that "the Canvas ePortfolio product was designed and offered solely *for use in an educational setting among students, classmates, and teachers*. It is not, and never has been, an employment recruiting or job placement tool." Opp. at 9 (emphasis added). This is demonstrably false and shows either willful blindness or complete ignorance of how the Canvas ePortfolio service has been marketed, offered, and used over the past decade.

29.   Since at least May of 2011, Instructure has expressly marketed and offered its Canvas ePortfolio as a tool to showcase Higher Education students' accomplishments to ***future employers***.

30.   The following is a screenshot taken from a YouTube video called "Instructure Canvas ePortfolios" published by Instructure on May 24, 2011, over two years before Defendant's claimed July 2013 first use of the Canvas mark for the California Job Board:
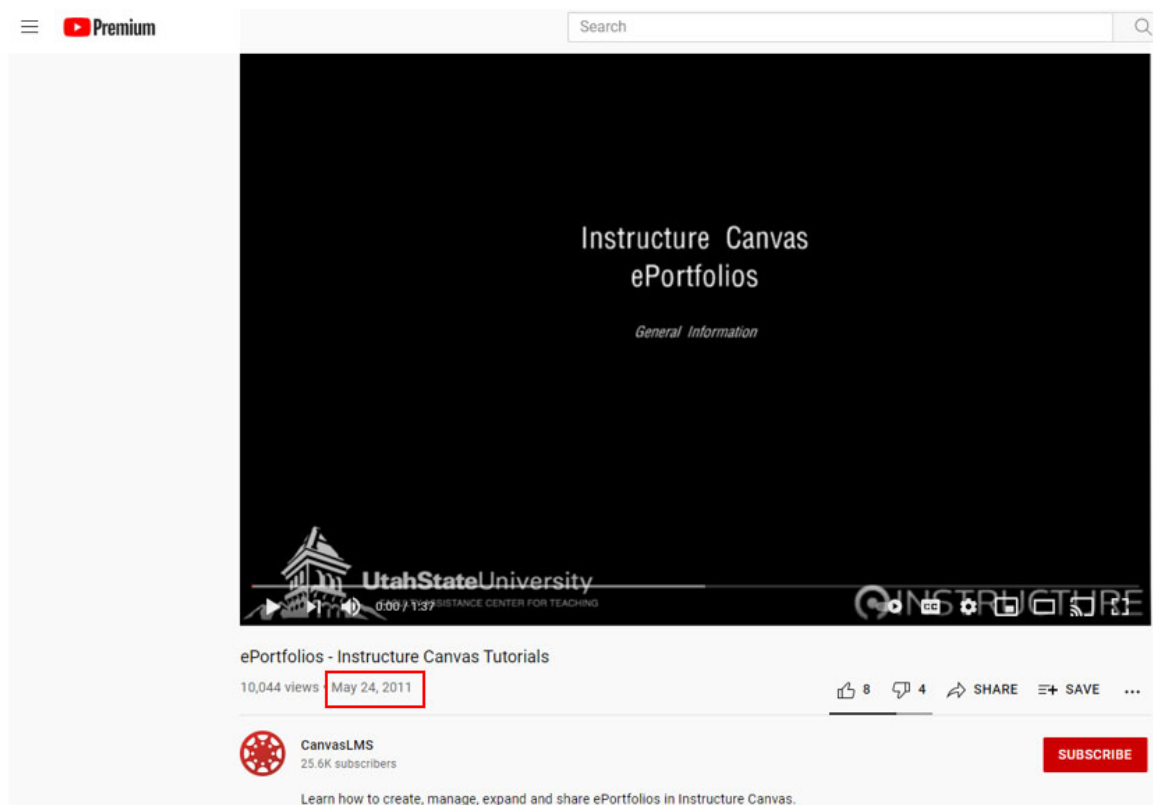
[ePortfolios - Instructure Canvas Tutorials - YouTube](). In this May 2011 video, Canvas instructs users that:

> "You can share these [ePortfolios] with classmates, with your friends, or even ***potential employers***" and "ePortfolios can also be made ***completely public***."

Id. at 1:16-1:24.[7]

31.   Higher Education institutions were asking Instructure for eportfolio functionality

for purposes of professional careers beyond the university as early as 2011, and Instructure pitched

its Canvas ePortfolios to those institutions at that time as a recruiting tool. For example, on June

6, 2011, Instructure issued its Response to Bowling Green State University's RFP. *See* Exhibit G.

Bowling Green State University stated that one of its "top requirements" for eportfolio

functionality is that it "[p]rovide learners a framework for building an on-line portfolio to

showcase their learning for academic and ***professional careers beyond BGSU***." Exh. G at 36

(emphasis added). In response, Instructure stated that:

> "Canvas users can build an unlimited number of ePortfolios in which to collect and
> document their educational projects, submissions, experiences, and other work products.
> ePortfolios provide the perfect platform for online educational journaling. Users can keep
> ePortfolios private or share with other students, instructors, and/or ***future employers***.
> ePortoflios can be downloaded into zip files for easy portability."

Id. at 36-37.

32.   As another example, attached to this Supplemental Declaration as **Exhibit H** is an

excerpt from Instructure's August 10, 2011, response to an RFP from Alamo Colleges District. In

this RFP response, Instructure pitched its ePortfolio as follows:

> "**ePortfolio**: Within the Canvas system, using the integrated ePortfolio tool, each student
> can start a collection of their educational projects, submissions, experiences, etc. These
> ePortfolios can be made public to share with other students, instructors and/or ***future
> employers***. This is an added benefit for any individual looking to keep a collection of their
> work from their educational career. There is no additional cost to Alamo Colleges for the
> Canvas ePortfolio tool."

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[7] The video also instructs users that the ePortfolios can be "exported to your hard-drive . . . or to
your desktop to get it out of the [LMS] system as well." *Id*. at 1:25-1:31. In other words, in line
with the distinction between an LMS and an eportfolio, Canvas ePortfolios belong to the users,
and not to the university, and can be used after graduation and completely removed from the LMS.

Id. at 37 (emphasis added). Instructure also explained to Alamo College that students were given

access to ePortfolios "independent of the instructor's requirements." *Id*. at 36.

33.   Similarly and as noted above, on December 8, 2011, Instructure submitted its

response to an RFP by Solano Community College District. *See* Exhibit F. In its RFP, the College

expressly asked Instructure about eportfolios. *Id*. at 111, ¶14.3. Instructure responded as follows:

> "Canvas has a built-in ePortfolio tool that is attached to user's profile, not a specific course.
> These learner-centered portfolios allow the student to select any work from any of their
> courses, and organize those and other artifacts or multimedia to demonstrate connections
> in their learning. The ePortfolio can then be shared internally, with other Canvas users, **_or
> it can be made public with a permanent URL that can be shared with_** friends, parents,
> **_prospective employers_**, and other interested parties."

Id. at 111, Response to ¶14.3 (emphasis added).

34.   In addition to touting Canvas ePortfolios as an employment-focused tool to Higher

Education institutions, since at least early 2011, Instructure has been marketing its ePortfolio

service to Canvas users themselves (*i.e.*, Higher Education students) as a tool to help them connect

with employers and showcase their skills. The following screenshots show how the Canvas

ePortfolio tool appears and is accessed within Canvas. As can be seen by the red arrows in the

screenshots below, which I have added for emphasis, the ePortfolio tool is readily accessible to

users in the dropdown menu on the left-hand side of Canvas as one of Canvas' main features. In

addition, the default screen that has continuously appeared **since at least 2010** when users clicked

on the "ePortfolios" option, has instructed users that they "can use an ePortfolio to: Display the

papers you're proud of **_for more than just your instructor to see_**" and to "Share your work with .

. . **_future employers_**" (emphasis added):

November 2012: "Canvas ePortfolio Feature" Video Showing the ePortfolio Page

The "ePortfolios" tool is located in this menu on a user's Canvas page.

Clicking on the "ePortfolios" menu option, brings users to this page that explains that users can use an ePortfolio to display items "for more than just your instructor to see" and to "share your work with . . . future employers."

See https://www.youtube.com/watch?v=g0GJ9u8ngX4&t=21s at 0:47.

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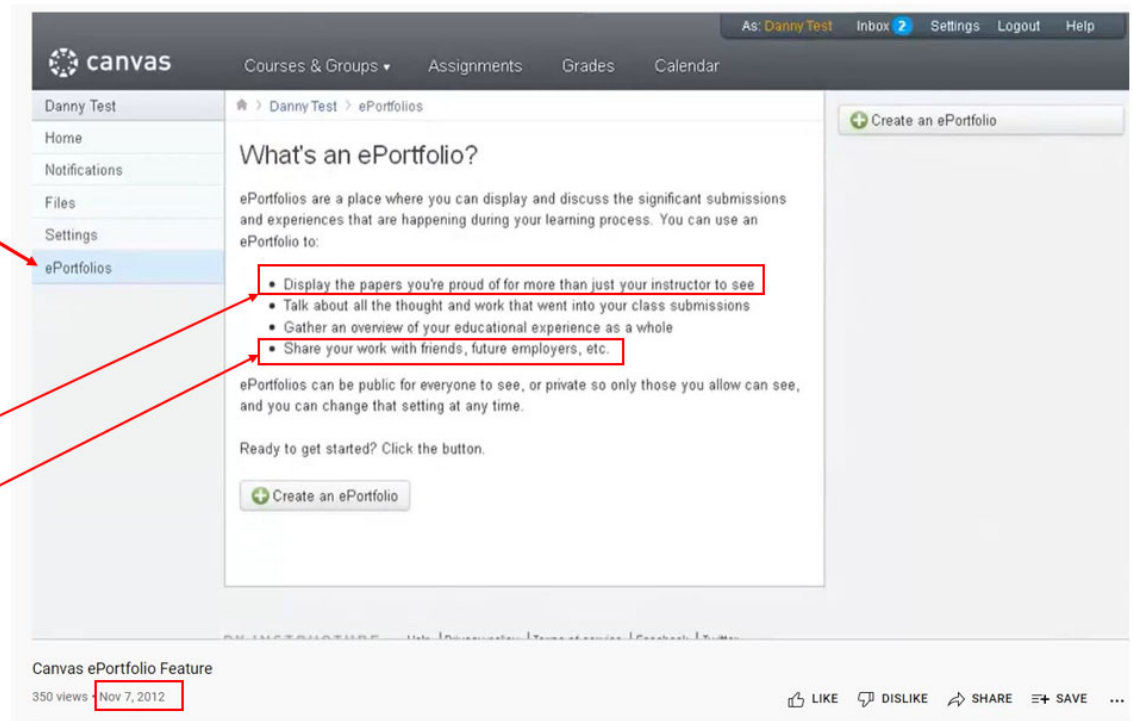
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December 2012: University of California Video Showing the Canvas ePortfolio Page

See https://www.youtube.com/watch?v=GyIRO9luxQQ at 0:43.

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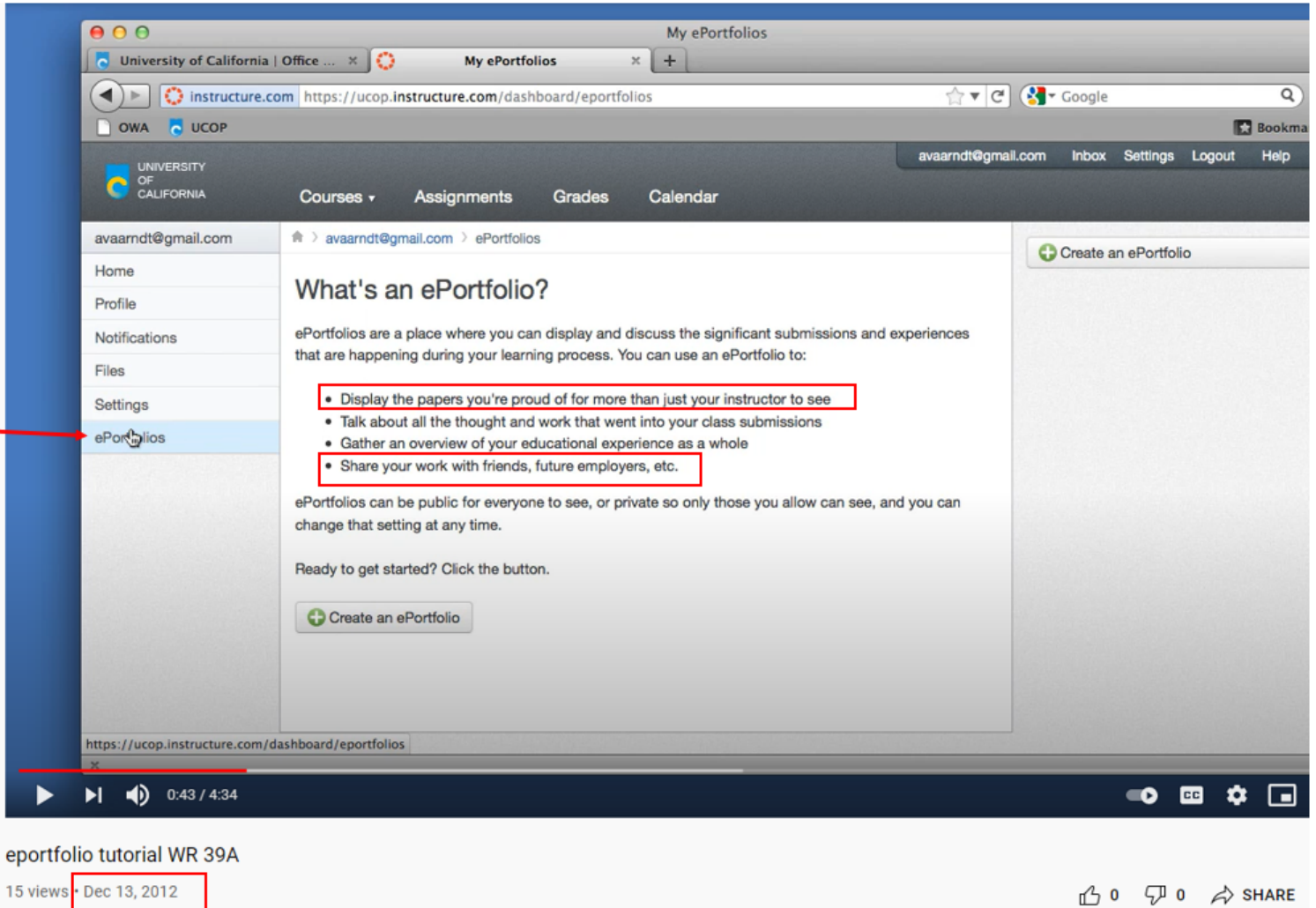
March 24, 2014: UNT Health Science Center Video Showing the Canvas ePortfolio Page

See https://www.youtube.com/watch?v=kF0aQFqEXzs at 0:57.

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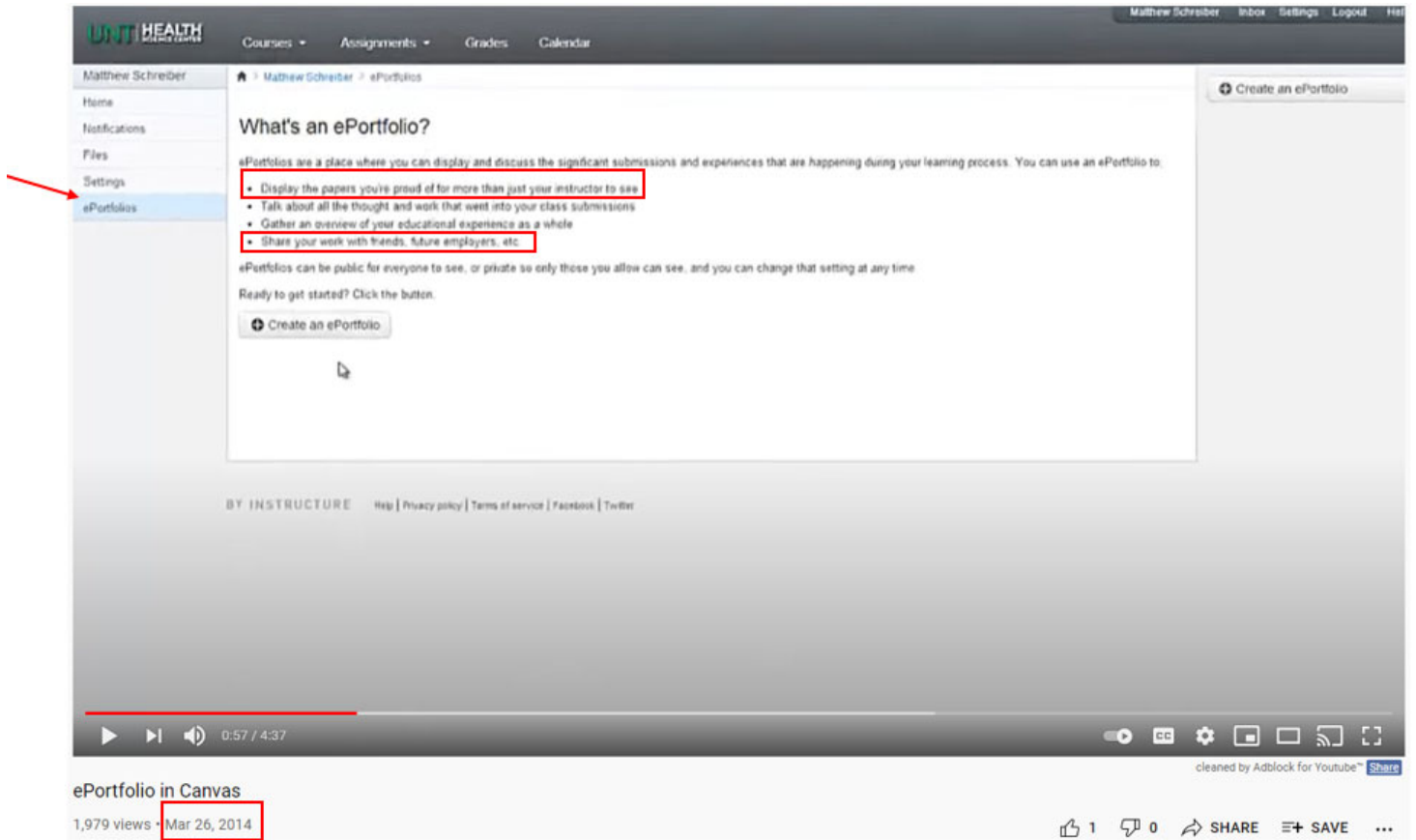
July 5, 2016: Canvas Video Tutorial Showing the Canvas ePortfolio Page
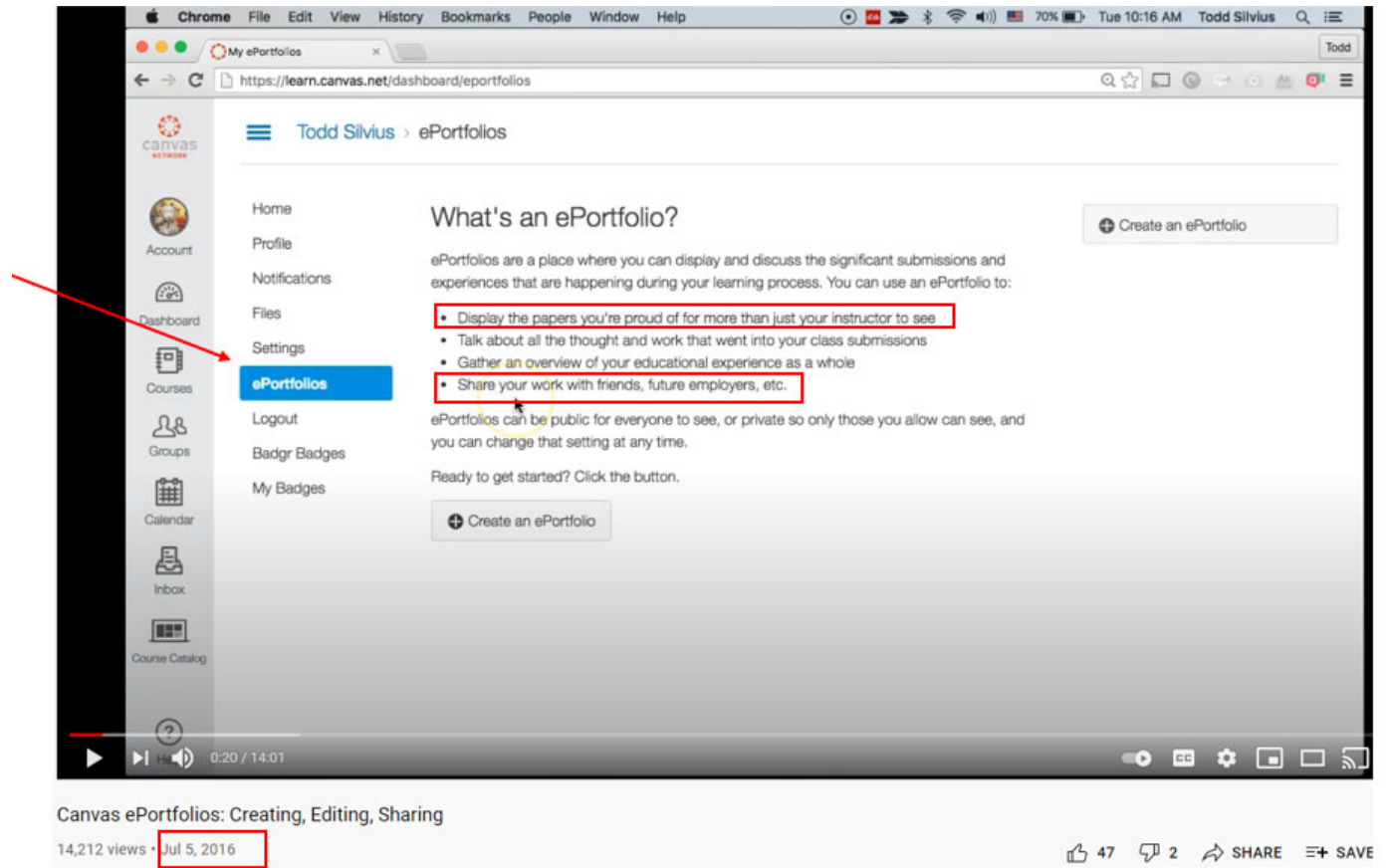
See Canvas ePortfolios: Creating, Editing, Sharing - YouTube at 0:20.

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March 30, 2018: Phoenix College Video Tutorial Showing the Canvas ePortfolio Page
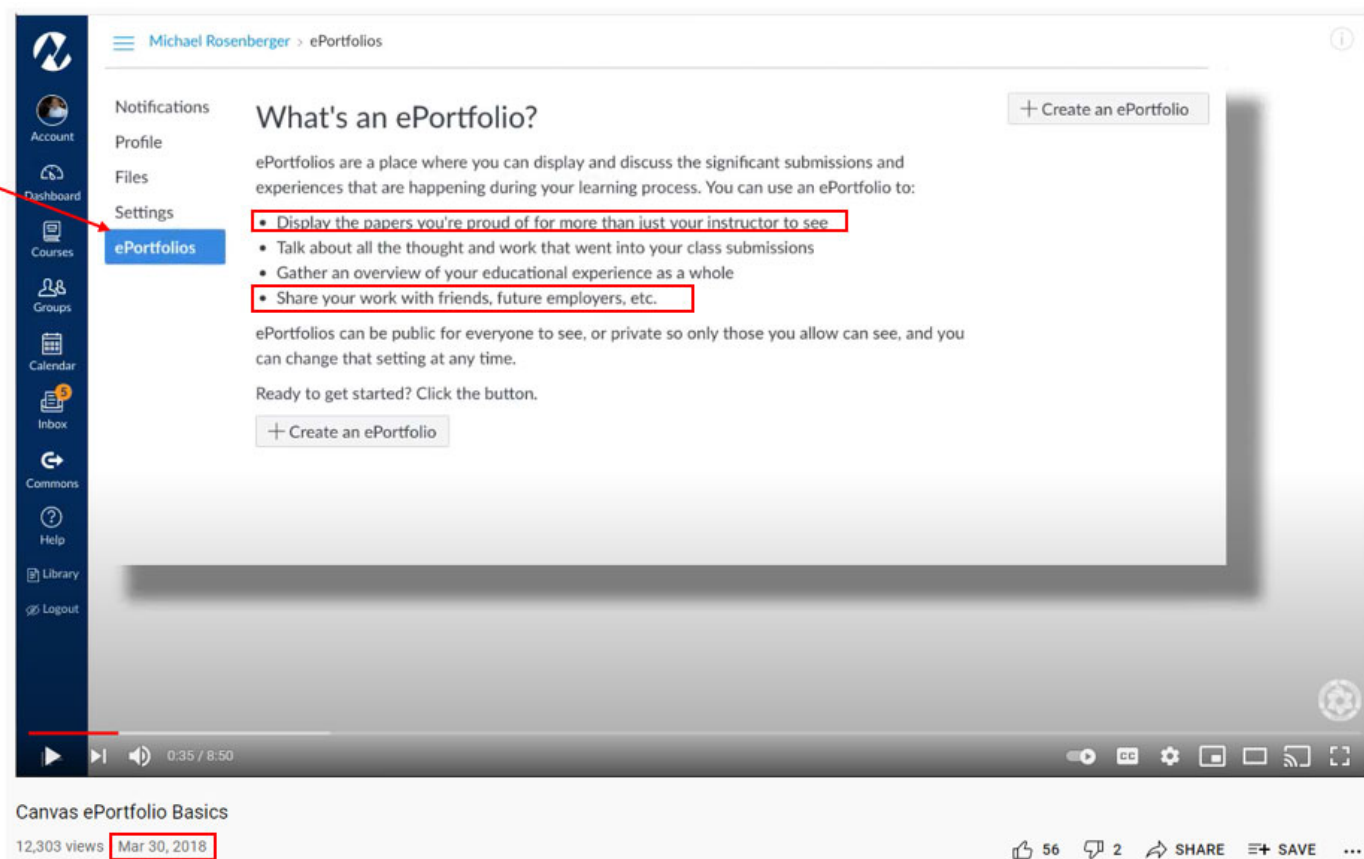
[(2129) Canvas ePortfolio Basics - YouTube](#) at 0:35.

35.   As shown by the screenshots above, the Canvas ePortfolio dashboard, which is

readily accessible by all Canvas users, has been continuously used over the past decade to instruct

users that ePortfolios are for "more than just your instructor to see" and that they can use be used

to share work with "future employers." As a result, ***tens of millions of Canvas users have seen***

this message over the past decade.

36.   In addition to being included within RFP responses and being prominently

displayed on the ePortfolio space of every Canvas account, Instructure also emphasized this

message in instructional YouTube videos. For example, on November 7, 2012 (over 8 months

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before Colby Smith started her California Job Board), Instructure published a YouTube video called "Canvas ePortfolio Feature," which instructed students that ePortfolio is a tool to "gather an overview of your educational experience as a whole and you can share your work with friends or ***future employers***." https://www.youtube.com/watch?v=Mddl9Q9vNCY at 0:20-0:28.

37.   Similarly, in a video tutorial published on Vimeo on May 15, 2013, two months *before* Colby Smith's California Job Board, Instructure explained that "[s]chools, colleges, and ***employers*** are interested in seeing ePortfolios to get a better sense of what students can actually do [and] how well they've performed":
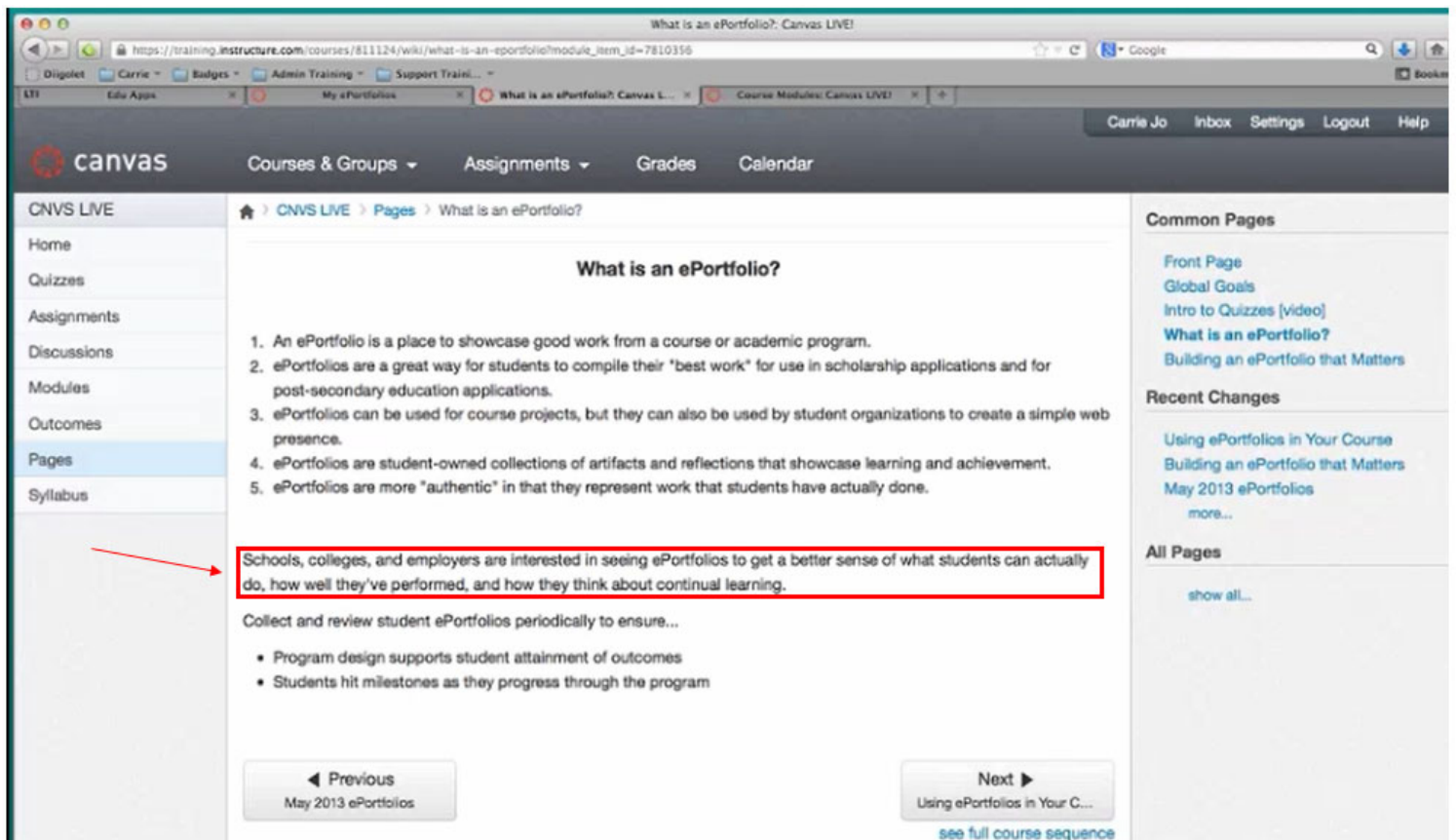
ePortfolios (Session 5) on Vimeo at 6:00.

38.   Instructure further explained in the video that:

"the concept of an ePortfolio is very similar to . . . an artist portfolio, an artist who has a portfolio of images, of their work, their sculpture, their paintings, has their drawings, photography, or a model has a portfolio of headshots, and full body shots, examples of their work and what they can do. An ePortfolio is very similar. It's a digital representation of a body of work. And, that body of work can include multiple things, it could include video, audio, it could include many different things, so we have full access to the web through an ePortfolio, so if it's online, it can be shared."

Id. at 6:35-7:21.

39.   Instructure also included in its May 2013 video an exemplar ePortfolio from Maricopa Community College that included a user's résumé and highlighted her professional development:
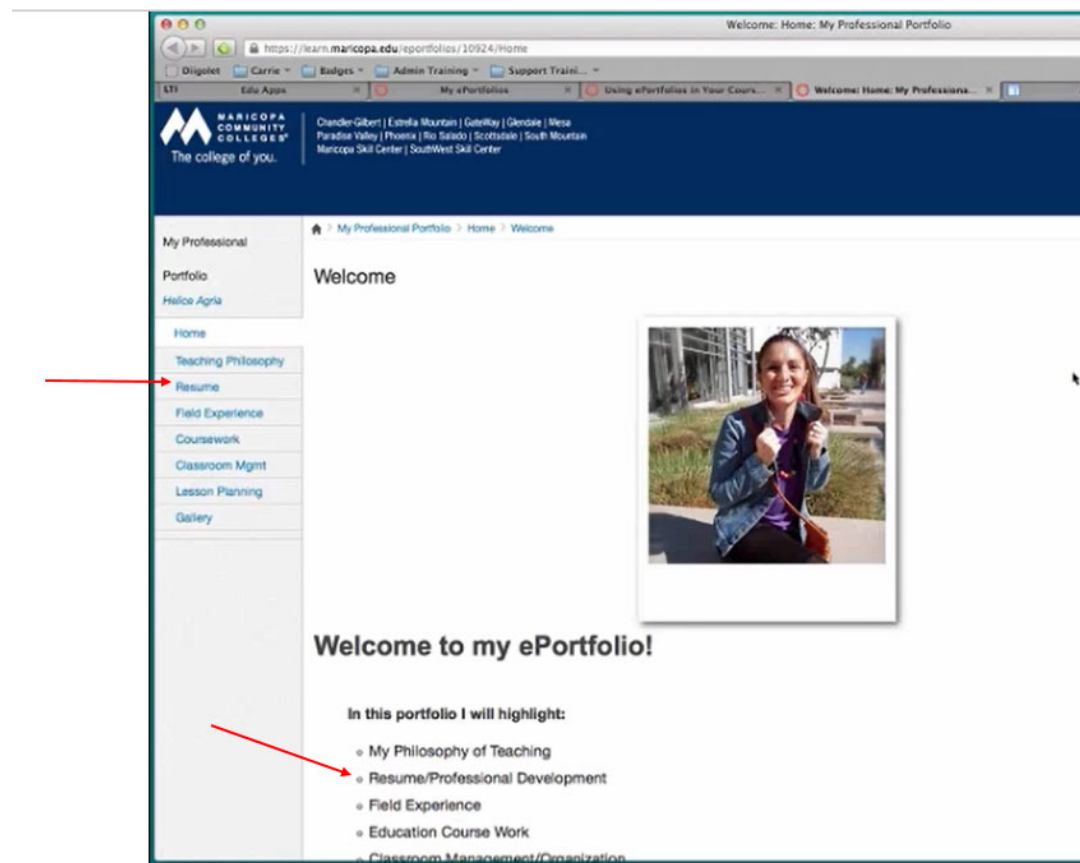
Id. at 10:45.

40.   In its May 2013 ePortfolio presentation, Instructure instructed its students that "[a]s you aim for higher education or a career, you'll find that a well-constructed ePortfolio that accurately reflects who you are and what you can do will help others recognize strengths and attributes that you'll bring to their company or project." *Id*. at 12:00. Users were instructed that because the end goal is aiming for higher education or a career, ePortfolios "should be a showcase":
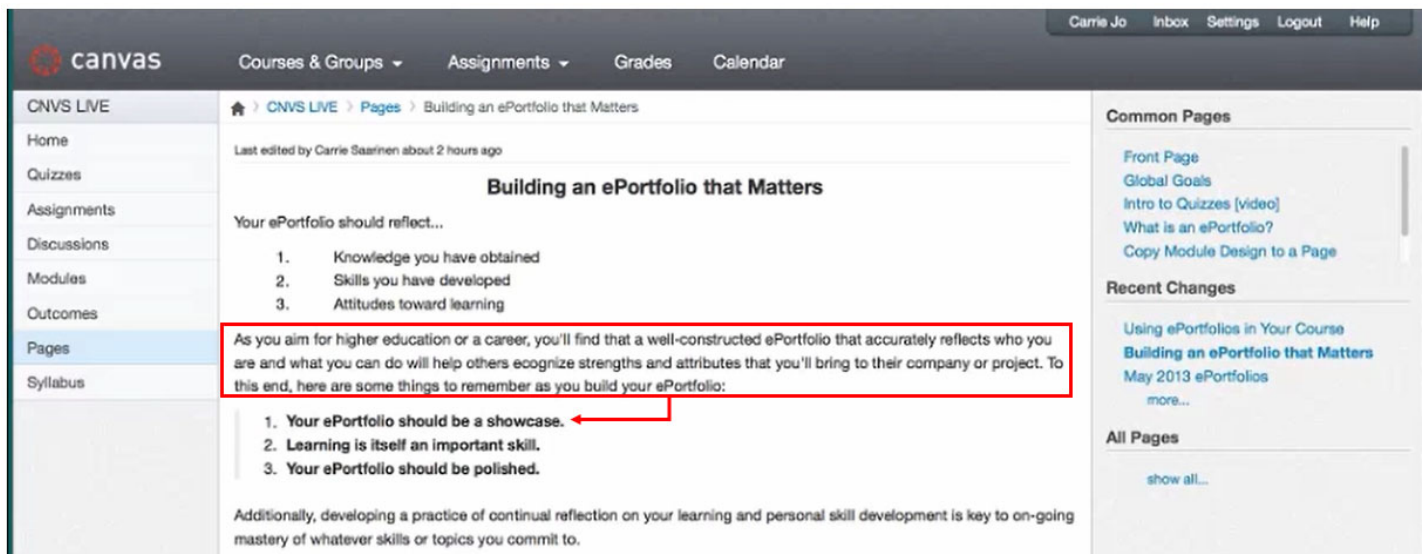
Id. at 12:00.[8]

F.   Students and Universities Have Used Canvas ePortfolio For Employment Purposes Long before Colby Smith Started Her California Job Board and Continuously Over the Past Decade.

41.   In its Opposition, Defendant claims that "Instructure has offered no evidence that

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[8] There are three types of eportfolios that are widely recognized: developmental, assessment, and showcase. "A developmental e-portfolio can show the advancement of skill over a period of time rubrics. The main purpose is to provide an avenue for communication between student and instructor. An assessment portfolio will demonstrate skill and competence in a particular domain or area. A showcase portfolio highlights stellar work in a specific area, it is typically shown to potential employers to gain employment." *See* Electronic portfolio - Wikipedia (emphasis added). *See also* Types of ePortfolios - Eportfolio Resource Center (google.com) (same).

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employers or students ever utilized ePortfolio as an employment recruiting and hiring tool." ECF 27 (Opp.) at 9. On the contrary, there is significant evidence that this is exactly how Canvas ePortfolio has been used over the past decade, including well before Colby Smith started her California Job Board in July of 2013.

August 2012 – Mesa Community College:

42.   On August 12, 2012 (almost one year *before* Colby Smith began her California Job Board), the Nursing Department of Mesa Community College published a YouTube video with the title "Creating an ePortfolio in Canvas." *See* Creating an ePortfolio in Canvas - YouTube. The Nursing Department used ePortfolio expressly as a tool for employment recruitment and hiring, as made crystal clear from the introduction to the video:

> "First off, why portfolios? Well just like a graphic artist would create one of their work, their outstanding work as an artist and ***go to a potential employer***, we are encouraging our nursing students to do the same . . . in this portfolio you will be encompassing all of your important work . . . uploading, scanning, putting things in, so that at the end of your journey with us at here at Mesa Community College you will have it all in one tiny package, ***an employer will be so impressed***."

Creating an ePortfolio in Canvas - YouTube at 0:12-0:47.

43.   As a networking and recruitment tool, Canvas ePortfolios are interactive and were designed to be shared and viewed. As shown in the Nursing Department's video, other users can post comments on a user's ePortfolio:
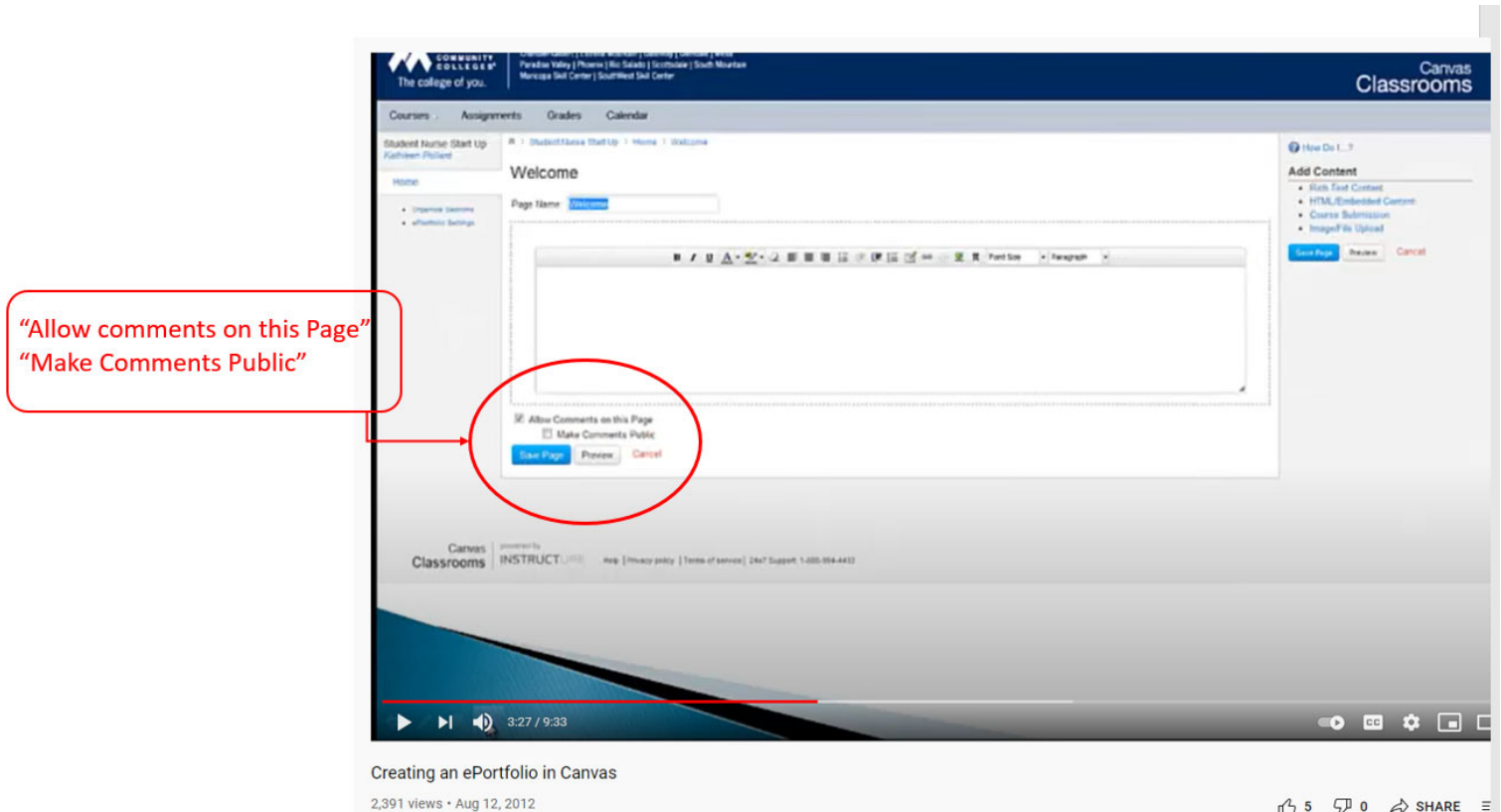
Id. at 3:27.

44.   The Mesa Community College Nursing Department created the ePortfolio shown below for "Nancy Nurse" as an example for its nursing students. Although a bit hard to read, comments appear on the homepage of Nancy Nurse's ePortfolio:

Creating an ePortfolio in Canvas

2,391 views • Aug 12, 2012

Id. at 4:54.

45.   The left hand side of the screenshot shows the sections in Nancy Nurse's ePortfolio.

These sections include "Lifelong Learning, "Professional Growth," and "Career Readiness."

46.   The title of the "Lifelong Learning" section of Nancy Nurse's ePortfolio is:

"Character Traits That Will Contribute ***To an Employer***":
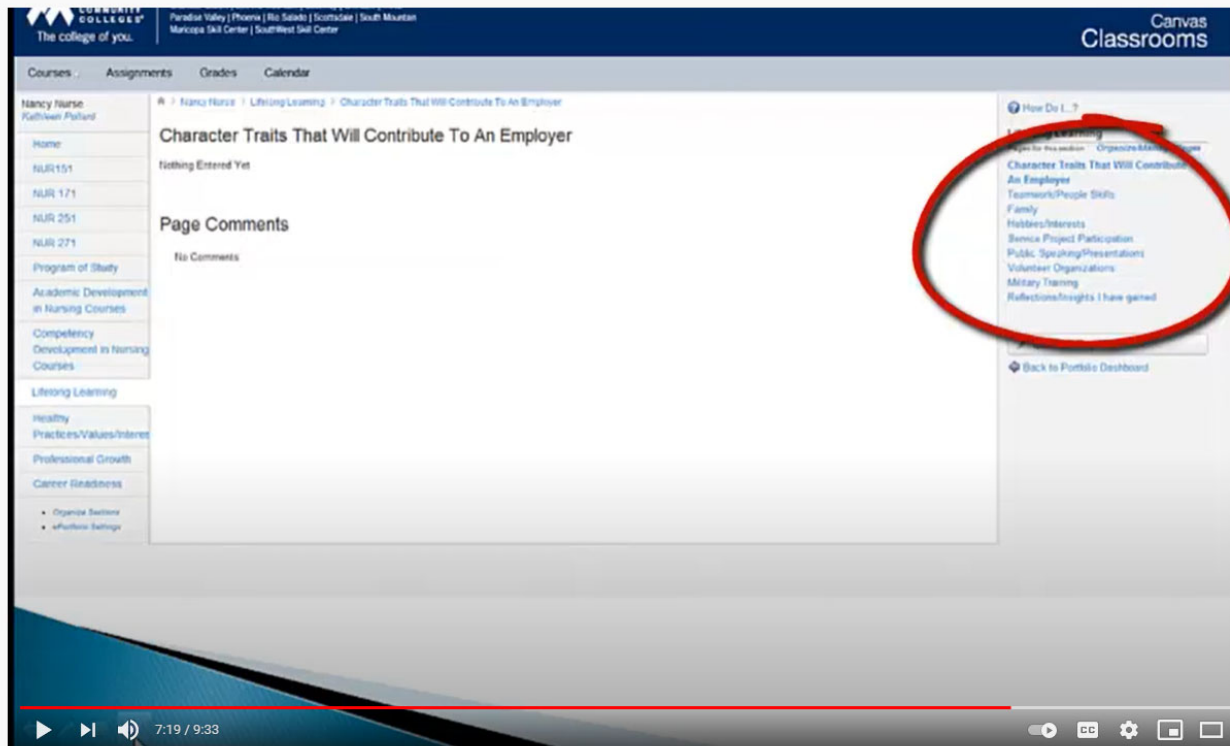
Creating an ePortfolio in Canvas

2,391 views • Aug 12, 2012

Id. at 7:19 (the red circle on the right-hand side of the screen is in the original). Students were encouraged to insert the following types of pages into the "Character Traits that Will Contribute to an Employer" section of their Canvas ePortfolios: "teamwork/people skills," "service project participation," "public speaking/presentations," "volunteer organizations," etc. *Id.*

47.   As shown by the following screenshot, in the "Career Readiness" section of the ePortfolio, students are instructed to upload résumés, letters of recommendation, certifications, awards and honors, leadership positions held, computer skills, and other items of interest to a future employer:
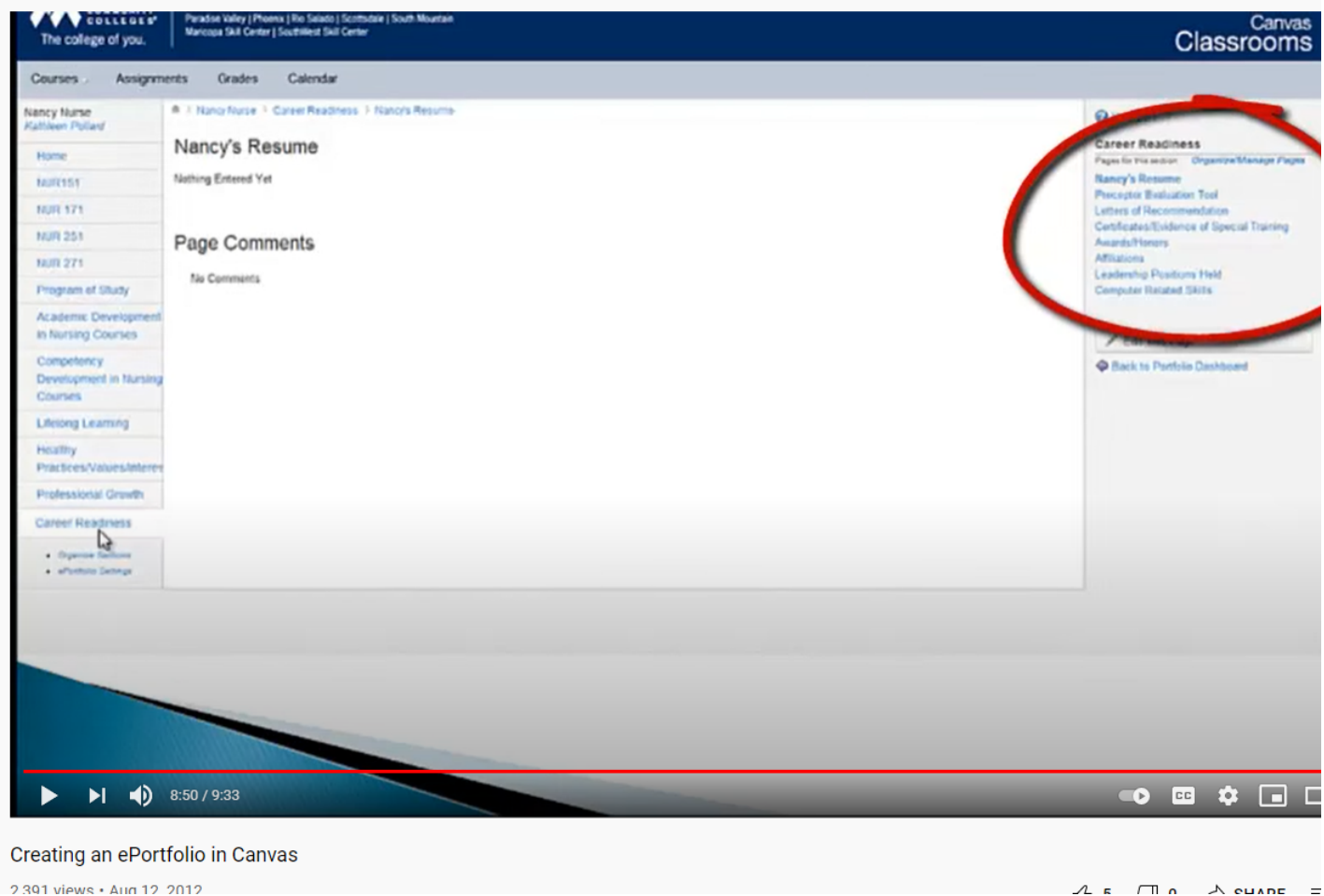
Id. at 8:50 (the red circle on the right-hand side is in the original).

48.   Thus, in August of 2012, the Nursing Department expressly instructed their students on how to use Canvas ePortfolio as a recruitment and job-seeking tool, and provided an example or template of exactly how students can accomplish this.

March 2014, University of North Texas Health Science Center:

49.   In a March 26, 2014, Vimeo video called "How to use the ePortfolio in Canvas," the University of North Texas Health Science Center instructed its students to use their ePortfolios to:

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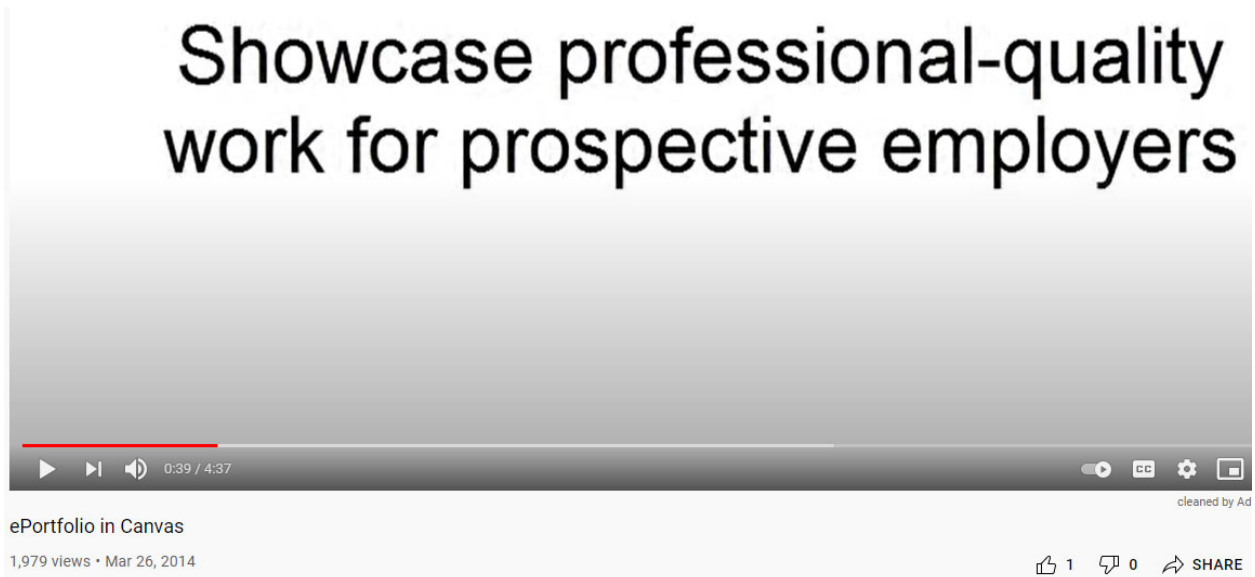
https://www.youtube.com/watch?v=kF0aQFqEXzs at 0:40. Again, this is an example of a University actually instructing its students to use their Canvas ePortfolios to seek employment.

March 2016, North Central Texas College:

50.   In March of 2016, North Central Texas College, published a guide called "Creating Your NCTC ePortfolio Using Canvas."[9] I attached the guide to my initial Declaration as Exhibit 28. *See* ECF 14-28. The guide states that "[t]his guide was intended specifically for NCTC students using the Canvas Instructure system." *Id*. at 3.

51.   The college instructs its students on why they should create an ePortfolio as follows:

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[9] Although this guide is not dated, the metadata contained within the "properties" for this PDF reveal that it was created in March of 2016.

WHY CREATE AN ePORTFOLIO?

Prospects can increase when an individual has organized proof of his/her work. Not only does it display the achievements themselves, but the dedication you put into creating a place for them.

Possible employers might see this sight to get a glance of your specific assignments pertaining to your field. It can also show them your work ethic and dedication to certain subjects. For example: they might view your writing skills from a freshman and sophomore class and compare the two to see if you had improved. While this may seem insignificant, it might be what gets you hired.

Whether continuing education is getting a masters, PhD, or even learning a skilled trade, an ePortfolio will provide professional documentation of your efforts. For example: applying to graduate school usually requires a letter of recommendation. If you did exceedingly well (or even completed an honors project) for a course, the professor might write you a letter of recommendation. This can then be posted within your portfolio for admissions to access.

Even if you decide to join the armed forces, a portfolio can allow you to represent yourself professionally to recruiters.

Id. at 5. Again, North Central Texas College is expressly instructing its students to use Canvas ePortfolio to connect with job opportunities in order to get hired.

May 2017, Mt. San Jacinto College:

52.   On May 9, 2017, a professor at Mt. San Jacinto College published a YouTube tutorial called "Create a Canvas ePorfolio" to instruct students on what an ePortfolio is and how to create one. *See* (2129) Create a Canvas EPortfolio - YouTube. In the tutorial, the professor prefaced her tutorial on creating a Canvas ePortfolio by instructing students that "[h]ere's why you need a portfolio. Basically what you do is you go to a job interview, you hand over your portfolio to your prospective employers. They get to flip through it and see what work you have created, and a little bit about yourself, over and above a job application or over and above your résumé. That work that you have in there is proof of what you can do." *Id*. at 0:45-1:17. She also instructed students regarding how an ePortfolio will help them gain employment:

> "The process of putting together a portfolio itself will help you become a more effective interviewee. You will be identifying the skills you have gained through your various experiences and how they relate to the career you are interested in. Choosing the most relevant experiences and putting them in an easily understood format will help you better articulate your skills and experiences when asked questions about your qualifications in an interview. A professional portfolio will also show an employer proof of your organizational, communication, and tangible career related skills."

Id. at 3:02. Here too, Mt. San Jacinto College expressly instructed its students to create a Canvas ePortfolio to aid them in the employment context.

April 2018, Canvas Community Post Regarding Potential Employers:

53.   Without doubt, over the past ten years, tens of thousands of higher education students have shared ePortfolios with potential employers. For example, on April 25, 2018, a Canvas Community member posted a question on the Canvas Community board with the caption "e-portfolios for potential employers." *See* Solved: e-portfolios for potential employers - Instructure

Community (canvaslms.com). In the post, the Canvas Community member stated that "[*w]e have*

students on placement creating e-portfolios, which includes previous assignments they have

chosen to include. ***These are then shared via private link with potential employers*** (who we have

set up with Canvas accounts, although I think this should not be necessary?)." *Id*.[10]

54.   Defendant states in its Opposition that "from 2010 to 2019, none of the services

offered by Instructure in connection with the CANVAS mark included any sort of hiring,

recruiting, placement, or staffing services." Opp. at 7. As shown above, this is absolutely not true.

At all times from 2010 through 2019, Instructure expressly offered and advertised its Canvas

ePortfolio service as a way for students to showcase their accomplishments to future employers.

See, for example, ¶¶28-31, 33-37 above. Further, during that time, higher education schools

expressly instructed their students on using Canvas ePortfolios as a tool to help them connect with

employers and job opportunities. *See* ¶¶ 39, 43-44, 46, 48-49. Finally, during that time, students

have actually shared their Canvas ePortfolios with prospective employers. *See* ¶50.

G.   Defendant Offers Competing Services to the Same University Students.

55.   Defendant's Canvas platform allows candidates, the majority of which appear to be

higher education students, to create an online profile by uploading information. Defendant's

Canvas platform allows students to then use their profiles to showcase their experiences,

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[10] Unfortunately, this user did not seem to understand how Canvas ePortfolio works as it is not necessary to provide potential employers with Canvas accounts before they can view student ePortfolios. Students may send links to their private Canvas ePortfolios to employers who can then access the ePortfolio without a Canvas account, or students can make their ePortfolio public. Despite this misunderstanding by this Canvas Community member, her comment reveals that in 2018 (before Instructure acquired Portfolium) students were creating ePortfolios as a job-seeking tool and were then sharing those ePortfolios with potential employers.

accomplishments, and skills, network with other students on Defendant's Canvas platform, seek a job, and for career enhancement.

56.   This service is similar to Instructure's Canvas ePortfolio service. Although Defendant calls the personal pages created by candidates "profiles," essentially, the customized and interactive profiles are eportfolios.

57.   Defendant's Canvas profiles allows a candidate to upload résumés and hyperlinks to other professional profiles such as LinkedIn or personal websites, add biographical and demographic information, create a description of who the candidate is and what they are looking for in a career, and add customized details in several categories including expertise, top skills, years of fulltime experience, languages, experience, and job preferences.

58.   The following screenshot shows the page on the Canvas platform where candidates create their profiles:

Let recruiters know where you are in your job search
Add job search stage

Please verify your email
By verifying the email you used to create your account, you ensure that you'll never miss a message from a recruiter or a new opportunity that aligns with your interests.

Resend email

View your activity
(only you can see this)

You haven't applied to jobs yet
Find jobs
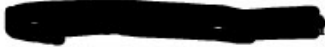
Add the basics of who you are and your background so recruiters can get to know you right off the bat

Add profile summary

You haven't RSVP'd to any events yet
Find events

Resume

Links

Only recruiters can view this

Upload resume

Share your other professional profiles or website

Add links

You haven't posted anything yet
Join the conversation

Contact Information

Don't feel represented?
Let us know

Highlights

Highly active user who is likely to respond within 24 hours

About Me

Share a short description of who you are and what you're looking for next in your career.

Add about

Demographics

Recruiters really value demographic data. This information will never hurt your chances of getting a job. Only recruiters can see this.

Add demographics

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59.   The main profile categories allow candidates to insert customized information in several subcategories. For example, the "Experience" category above includes the following subcategories:

Add Experience

Experience Type

(Work Experience)   (Volunteer Work)   (Achievement)

(Education)   (Other)

60.   Within each subcategory, students are able to insert customized information of the students' choice. For example, many of the subcategories include a "description" rich text editor box where candidates can enter text of their choice and can insert a hyperlink to another website. The following is the "Work Experience" subcategory that includes this functionality:

✕	Save

Example: Google or Code2040 🔍   Example: Software Engineer 🔍

Start date   **End date**

MM/YYYY   MM/YYYY   ☐ Current experience

Location

Add a location   🔍

☐ Worked remotely

Description (Optional)

One or two sentences explaining your role.

B *I* U̲ ≔ ≡ 🔗

61.   Defendant's Canvas profiles also includes a "Links" category that instructs candidates to "share your other professional profiles or website" and allows candidates to insert

hyperlinks to other websites into their profile, including to LinkedIn and to their personal website:

62.   Through their Canvas profiles, users can share information, ask questions, post comments, and network with other users by clicking on the "Join the conversation" option on their profile page:


63.   Thus, Defendant's Canvas platform is not a job board, as candidates are not just names and résumés within a database. It appears that the vast majority of the candidates on

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Defendant's Canvas platform are higher education students. For example, the following screenshot includes hyperlinks to the profiles of some of Defendant's "Canvas Members." As can be seen from the screen shot, the majority of the users are university students:
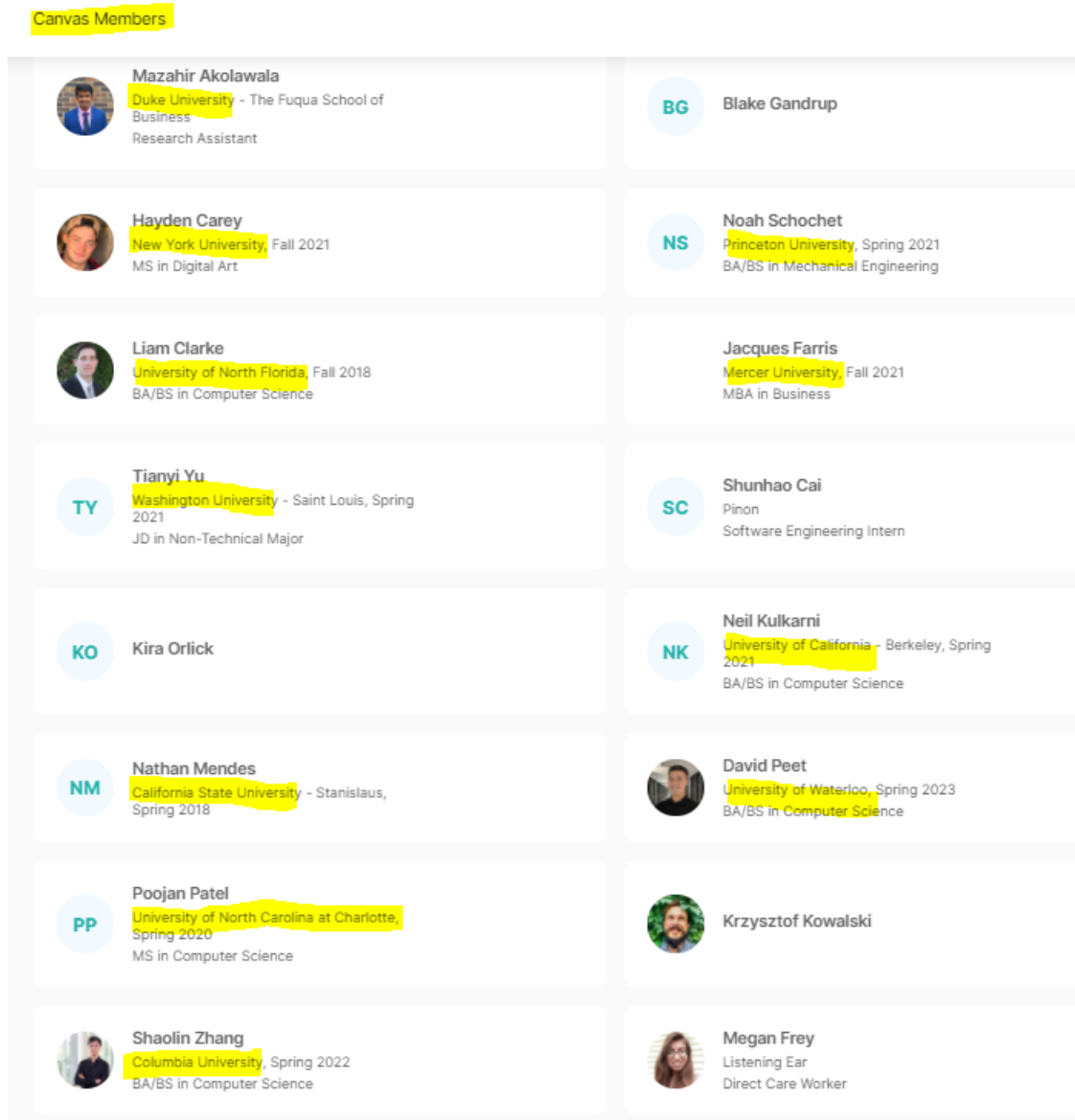
64.   Thus, without doubt, Instructure's Canvas ePortfolio tool and Defendant's Canvas profile tool targets and is used by the same higher education students. Indeed, shortly after Defendant announced its rebrand from Jumpstart to Canvas on its Canvas Community board, a

student from the Metropolitan State College of Denver responded that "Canvas is the name of an online learning platform."
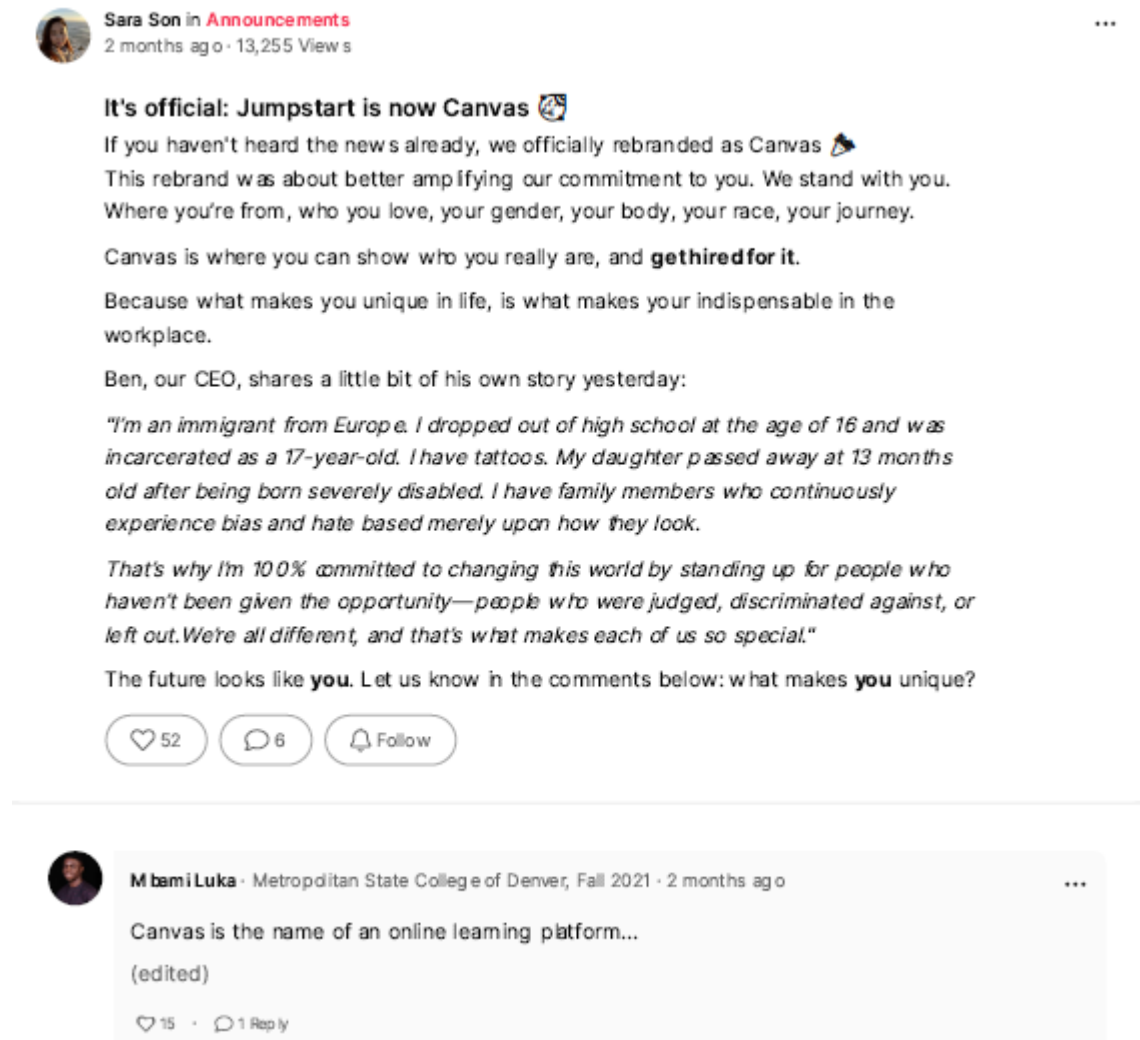
See ECF 14-25 (Exh. 25 to my Initial Declaration). Another student attending Florida State University wondered "How are y'all gonna just steal another company's product name? Seems problematic at best." *See* ECF 14-26 (Exh. 26 to my Initial Declaration). A student chimed in with "Seriously, not to mention that the other product is also a website/app for students. It's not like Jumpstart was a bad name either." *Id.*

65.   Defendant's Canvas users can search for profiles of students attending a particular school and send messages to those students. For example, the following screenshot shows some of the Canvas profiles of students attending the University of Utah and a "message" button for contacting each student:
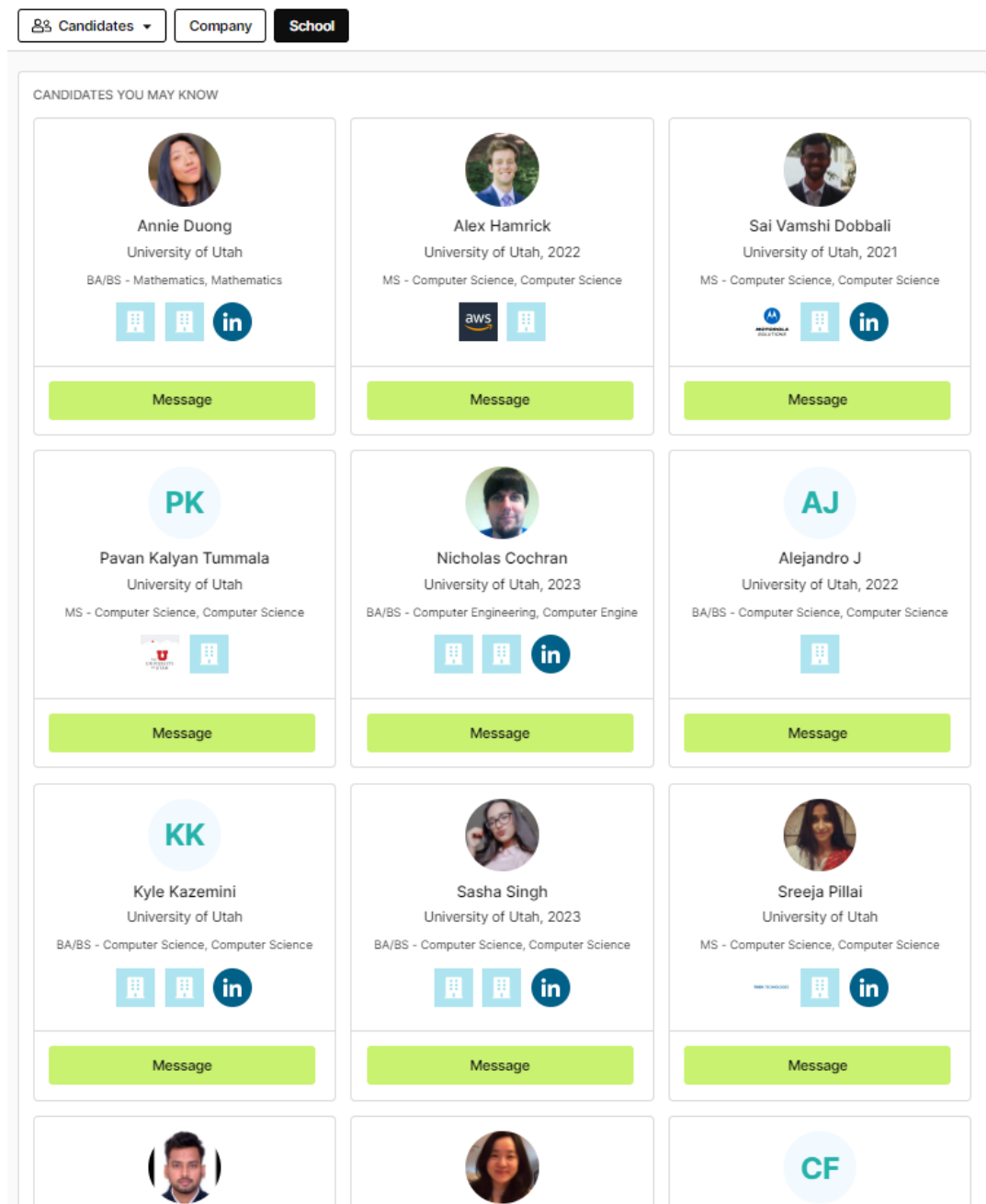
66.   This messaging feature within Defendant's Canvas platform, and the ability for Canvas users to "join the conversation" from their profiles, is similar to a messaging feature within Instructure's Canvas platform called "conversations." Instructure's Canvas members can search for users, view users' profiles, and compose and send messages to users through a "conversation" inbox. *See*, *e.g.*, How do I send a message to a user in an account? - Instructure Community (canvaslms.com).

67.   The following is an example of a Canvas member's profile on Defendant's platform with some of the profile's functionality highlighted:

(This profile is continued on the next page).

FULL-TIME
Integrated Strategy Intern - Bleacher Report
New York, NY, USA | Jun 2019 — Aug 2019

- Supported account executives in building, budgeting and marketing campaign proposals and re-cap decks to meet benchmarks of key national advertisers
- Researched social media analytics across all platforms (FB, TW, IG, YT), extracting a cohesive story for clients
- Tracked and contextualized trends for a comprehensive branded content competitive analysis, arming departments across the company with vital industry updates

FULL-TIME
Program Strategy and Planning Intern - HBO
New York, NY, USA | Jun 2018 — Aug 2018

- Wrote synopses and promotional highlights for HBO content that appeared in monthly marketing materials used by third-party distributors of HBO programming, such as Amazon.
- Contributed to weekly programming meetings, updating HBO employees on the new programming calendar

Job Preferences

Preferred roles
Product Manager, Marketing, Content Strategist, Not Sure Yet

Preferred locations
Totally Open, Remote, Atlanta, GA, Austin, TX, Boston, MA, Chicago, IL, Denver, CO, Los Angeles, CA, Nashville, TN, New York, NY, Raleigh, NC, San Diego, CA, San Francisco, CA, Seattle, WA, Wilmington, DE, Houston, TX, Dallas, TX, Detroit, MI

68.   Higher Education students are creating similar ePortfolios in Instructure's Canvas platform. The following is a "Sample ePortfolio in Canvas" for Indiana University students:

☰ Sample ePortfolio in Canvas › Home › Welcome

Sample ePortfolio in Canvas
Alice Dobie

Home
About Me
Goals
Academics
Experience
Resume
Other Accomplishments

Welcome

Post a photo of yourself and a brief introduction to you and your ePortfolio.

Guidelines for this page:

- A photo of you in professional dress attire or at least business casual
- The purpose of your ePortfolio
- A brief description of your goals, which of course would include that you are pursuing a bachelor's degree at Indiana University-Bloomington. If you say you are a freshman, remember that you will need to update that next year.
- Optional: a quote that describes a view or philosophy you value.

Home

Pages for this section

Welcome

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See https://iu.instructure.com/eportfolios/24620/Home.

69.   Clicking on the "About Me" menu option in the left-hand side of this sample
Canvas ePortfolio results in the following:

See https://iu.instructure.com/eportfolios/24620/About_Me.

70.   Clicking on the "Goals" menu option, results in the following:

☰ Sample ePortfolio in Canvas › Goals › Goals

Sample ePortfolio in Canvas
Alice Dobie

Home
About Me
Goals
Academics
Experience
Resume
Other Accomplishments

Goals

Lay out your plans, update them when necessary, and chart your accomplishments.

Suggested Content in Goals:
1. Academic goala. Examples: Your major, minor, professional or graduate school. If you are exploring, then right now your goal is to choose your major.
2. Career goals. Examples: Practice dentistry, run your own bakery, write the user manuals for new software.
3. For each of the above, list short-term goals that will help you reach your longer-term goals of gaining a degree and having a successful career. What knowledge and skills will your need to develop to be able to reach your goals?
4. Describe how your goals are related to your values, interests, personality, and skills. You may refer the user to your "About Me" pages.
5. If your goals have changed, that is okay. Describe what happened to change your goal. For example, did you discover after shadowing a dentist that having your hands in people's mouths all day is not for you. Or maybe the goal is the same but the path you have chosen has changed. Record and reflect on your exploratory process!

Optional: Provide personal goals. For example running a marathon, grow & can your own food, skydive.

Use a side menu with additional pages if you have a lot of goals. See the right menu here for an example.

Your goals are concrete "things" you want to do. As you accomplish your goals (short and long term), they may show up in your academic and/or work pages in your ePortfolio. Or in turn, perhaps a work experience or class may have changed your goals. When appropriate, refer users to your academic and work pages for all the details of the experience.

Goals
Pages for this section
Goals
Academic Goals
Career Goals
Personal Goals

Page Comments

Comments for this page are private. You can make comments, but only the portfolio's owner will be able to see them.

Add a New Comment:

You must be **logged in** to make comments on this page.

See https://iu.instructure.com/eportfolios/24620/Goals.

71.   The "Résumé" menu option, results in the following:

☰ Sample ePortfolio in Canvas › Resume › Resume

Sample ePortfolio in Canvas
Alice Dobie

Home
About Me
Goals
Academics
Experience
Resume
Other Accomplishments

Resume

The best way to present your resume here is to link to a pdf of the resume. That way it should look the same no matter how it is being viewed. DO NOT PROVIDE CONTACT INFORMATION FOR REFERENCES ONLINE. Instead you can include a statement at the bottom of your resume that says "References Available Upon Request".

Resume
Pages for this section
Resume

Page Comments

Comments for this page are private. You can make comments, but only the portfolio's owner will be able to see them.

Add a New Comment:

You must be **logged in** to make comments on this page.

See https://iu.instructure.com/eportfolios/24620/Resume.

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72.   Clearly, both the Defendant Canvas profile and the Instructure Canvas ePortfolio

shown above are created for and intended to be shared with prospective employers and both serve

a similar function; *i.e.*, helping the student connect with job opportunities, network with other

students, and highlight relevant skills of interest to employers.

73.   In addition, and as contrasted to a "job board," Instructure's Canvas ePortfolios and

Defendant's Canvas Profiles offer similar interactivity and functionality: both allow students to

insert hyperlinks to other websites within their profiles/ePortfolios, both allow text to be

customized within the profiles/ePortfolios, both profiles/ePortfolios can be shared with other

students or users within the respective Canvas platforms, both profiles/ePortfolios permit other

students or users to submit messages or comments on the profile/ePortfolio; and both permit a link

to the profile/ePortfolio to be copied and shared or emailed to a prospective employer.

74.   To make things even more confusing, both Canvas platforms also offer users a

"Canvas Community":

Hi ▪▪▪▪

Welcome to the Canvas community! We're so excited that you've chosen to make Canvas a part of your career search, and are thrilled to welcome you to a community of hundreds of thousands of other candidates on a similar search.

Now that you're here, you can add a ton of information to your Profile to really stand out, apply for Jobs, RSVP to Events, and engage with everyone else here in our Communities. Navigate around to see what might interest you, and join in the conversation!

We're bringing new partners onto the platform all the time who are actively sourcing for candidates like you, and we also have job postings on the platform from other sites so you can see everything in one place.

We look forward to having you as a part of the community for years to come!

If you have any questions or feedback for Canvas, please email **info@canvas.com**
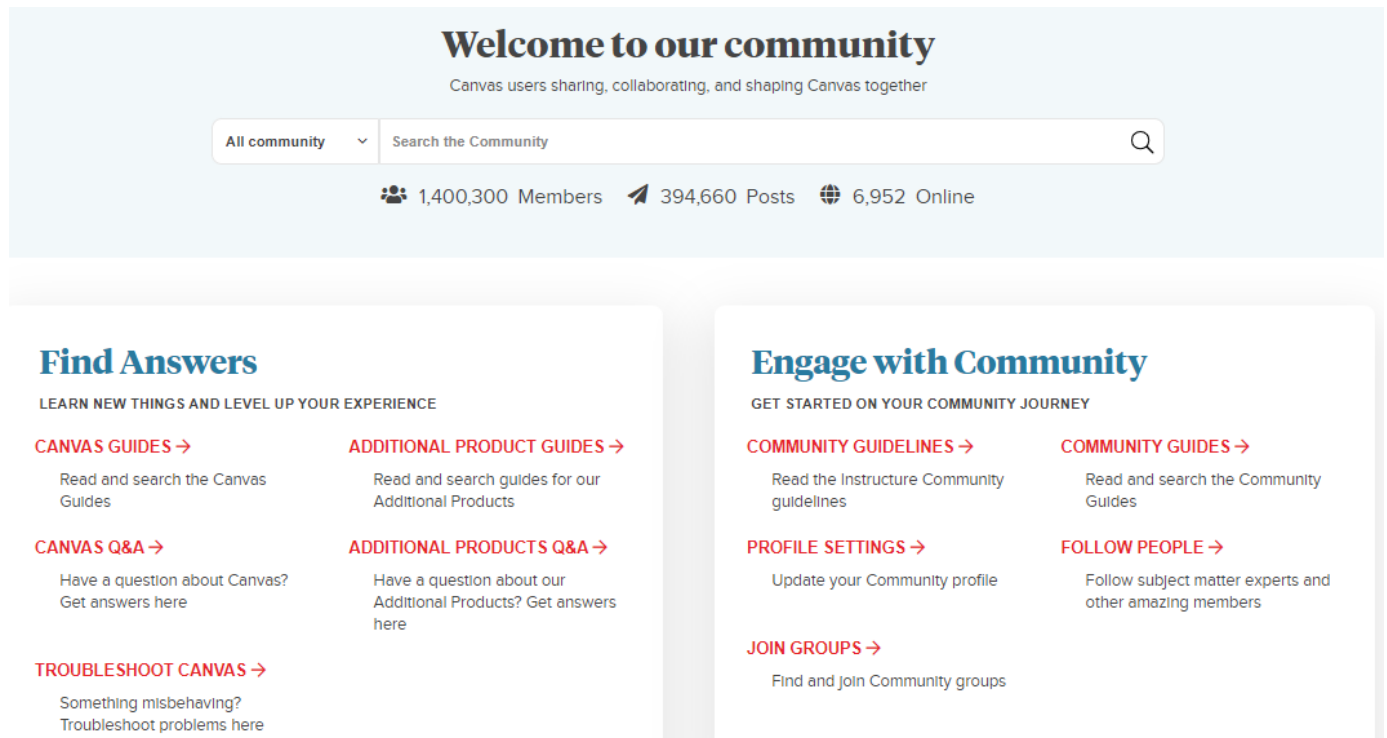
The screenshots above show Defendant's Canvas Community and Instructure's Canvas Community respectively.

75.   Thus, Instructure's Canvas ePortfolio service and Defendant's Canvas profile service both offer the same higher education students the ability to create a customized online profile/ePortfolio for networking with other students and/or for sharing with prospective employers. Defendant's profile service competes directly with Instructure's Canvas ePortfolio service for the same users. Defendant should not be permitted to trade on the goodwill that Instructure has painstakingly acquired over the past ten years by using the Canvas mark for substantially similar services offered to the same students.

H.   Portfolium Is an Expansion of the ePortfolio Service that Instructure Has Been Offering Since 2010.

76.   In 2019, Instructure acquired Portfolium. Portfolium is an eportfolio network that

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allows users to visually showcase their work and projects directly to employers, faculty, and fellow

students/alumni. Portfolium is a tool where students can build online portfolios:

The Portfolio-Building Power Tool for Students

With Portfolium's free Folio Network, you can build an impressive online portfolio showcasing your learning achievements. When you leave school, your Folio follows, so you can add new wins and experiences as you complete internships and volunteer work, acquire new skills, and land jobs. You'll also be able to connect and network with other Folio users ('cause as we all know, career success is often about *who* you know).

See https://portfolium.com/.

77.   Portfolium is a natural extension and more sophisticated version of what Instructure

has been doing with its Canvas ePortfolios for over a decade.

78.   In fact, users are able to download their Canvas ePortfolios and transfer the

ePortfolio content into Portfolium:

mlarson21
Community Member
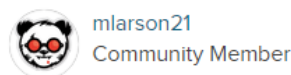
⬦ 05-21-2021 01:20 PM

Transfer Old Canvas ePortfolio to New Canvas Folio (Portfolium)??

I know you can download a zipped copy of your old Canvas ePortfolio. However, we now have the ePortfolio tool AND Canvas Folio (Portfolium) and I'd like to know if there's an easy way to transfer what a person has done in their old ePortfolio to Canvas Folio (Portfolium) without starting at the beginning again.
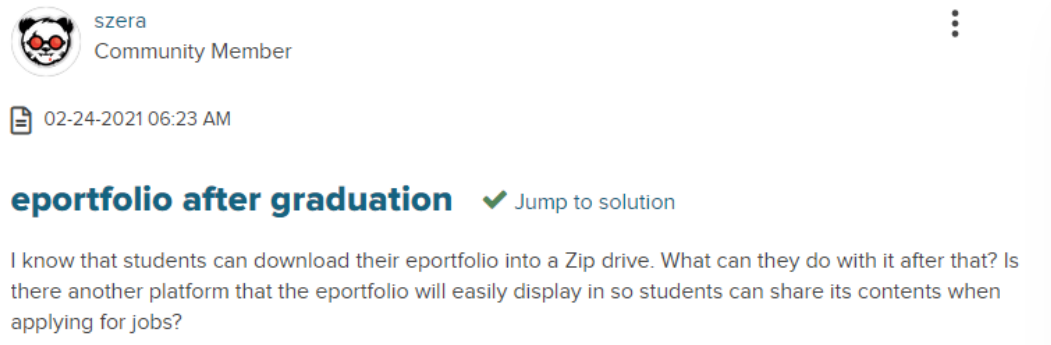
thanks!

Miriam

See Transfer Old Canvas ePortfolio to New Canvas Folio... - Instructure Community (canvaslms.com).
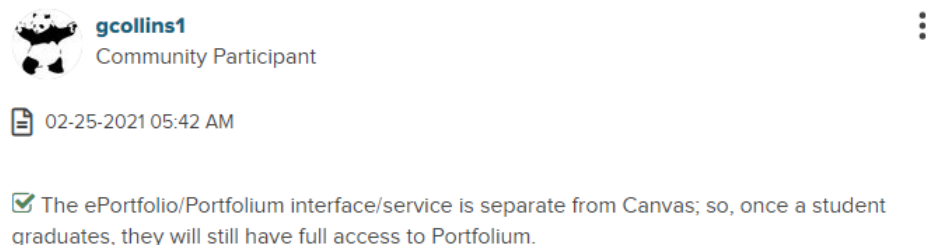
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79.   One Canvas ePortfolio user requested information on Canvas Community regarding how students could display their ePortfolio contents after graduation so that they could continue to share their ePortfolio contents when applying for jobs:

szera
Community Member

02-24-2021 06:23 AM

eportfolio after graduation   ✓ Jump to solution

I know that students can download their eportfolio into a Zip drive. What can they do with it after that? Is there another platform that the eportfolio will easily display in so students can share its contents when applying for jobs?

See Solved: eportfolio after graduation - Instructure Community (canvaslms.com).

80.   In response, another user directed the first user to Portfolium:

gcollins1
Community Participant

02-25-2021 05:42 AM

☑ The ePortfolio/Portfolium interface/service is separate from Canvas; so, once a student graduates, they will still have full access to Portfolium.

See Solved: Re: eportfolio after graduation - Instructure Community (canvaslms.com).

81.   Thus, after graduation, students can download their ePortfolio contents in order to transfer their ePortfolios into Portfolium to apply for jobs. Although Portfolium is more sophisticated than Canvas' ePortfolio tool, it is a natural extension of the tool in users' minds and for practical purposes of seeking and applying for jobs. As one Canvas ePortfolio student commented "Portfolium looks like a nicer version of [e]portfolios." Ability to access ePortfolio after graduation? - Instructure Community (canvaslms.com).

82.   Defendant has admitted infringement with respect to Portfolium, but claims priority based on the commencement of the California Job Board in July 2013. Even assuming the California Job Board offered similar services to the parties' respective Canvas platforms and that Defendant can actually show it has trademark rights in Canvas for the California Job Board, as shown above, Defendant still does not have priority. Canvas ePortfolio has offered recruiting services to higher education students since 2010. Because Defendant admits a likelihood of confusion and infringement with respect to Portfolium, which is simply a more complicated eportfolio service, Defendant has likewise admitted infringement with respect to the Canvas ePortfolio service.

I.   Instructure Never Enforced its Canvas Mark Against the California Job Board or Jobvite Because They Do Not Operate In Our Space.

83.   Defendant claims that Instructure cannot show irreparable harm absent an injunction because the California Job Board and Jobvite operated "for years before Instructure first started using the mark for related services in 2019." Opp. at 21.

84.   On the contrary, Instructure does not now care nor has it ever cared what the California Job Board and Jobvite do because they do not operate in our space and do not infringe our mark.

85.   First, after Instructure's lawyers sent a letter to Defendant demanding that Defendant stop using our Canvas Mark for its competing services, Defendant acquired by assignment trademark rights purportedly owned by Colby Smith. Prior to this time, I had never even heard of the Canvas that operates in the wine industry in California or of the California Job Board. This is not surprising to me since the California Canvas operates solely in the hospitality and wine industry and solely in California.

86.   The Concierge Alliance of Napa and Sonoma has been using the stylized Canvas mark (which includes specific colors and the words "Concierge Alliance of Napa and Sonoma") since September of 2010 (which is *after* Instructure began using Canvas in April of 2010 for its LMS and in July of 2010 for its ePortfolio). The Concierge Alliance states on its website that Canvas is a "dynamic organization comprised of outstanding leaders in the hospitality community" and that its members "continuously provide guests to Napa and Sonoma with the best possible experiences." https://conciergealliance.com/who-we-are/. According to Concierge Alliance, Colby Smith's Canvas "serves two audiences": "the Wine Country Hospitality Community" and "visitors who want to discovery the intimate experiences of our Wine Region." https://conciergealliance.com/. This has nothing whatsoever to do with the services offered by either Instructure or Defendant.

87.   Concierge Alliance has been using Canvas in connection with the California Job Board since July of 2013 (which is *after* Instructure began using Canvas in April of 2010 for its LMS and in July of 2010 for its ePortfolio). By its own terms, the California Job Board is limited geographically to California. The California Job Board unequivocally and expressly states that it is for "Job Providers and Job Seekers in Napa and Sonoma." Opp. at 5. In the Opposition and the Declaration submitted by Colby Smith, neither Defendant nor Colby Smith claims that Canvas has ever been used in connection with the California Job Board outside California. Further, the California Job Board has a menu showing the locations of available jobs which states "California" and only shows locations within California:
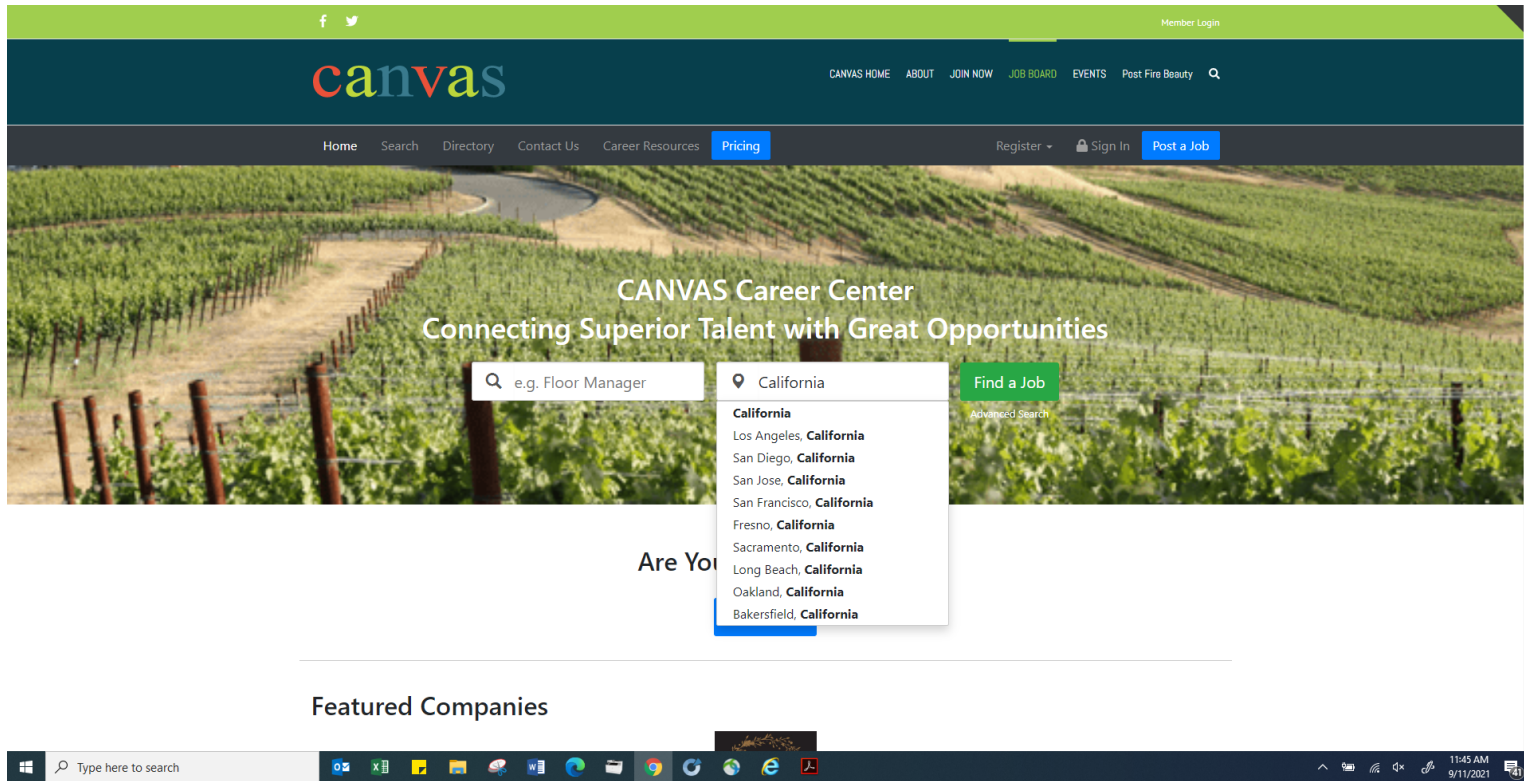
See https://jobs.conciergealliance.com/. There is currently only one job opening posted on the California Job Board and it is for a "tasting room assistant" at Meadowcraft Wines in Sonoma, California. I have not seen any evidence that job providers and job seekers ever used the California Job Board outside of California. Neither Defendant nor Colby Smith provided any evidence that anyone ever used the job board to seek anything other than a wine or hospitality related job in California. Thus, this too has nothing whatsoever to do with the services offered by either Instructure or Defendant.

88.   If the California Job Board had actually been used outside California and for jobs outside the wine and hospitality industry, I would expect Colby Smith to say so and to submit evidence demonstrating this. She did neither. I do not believe that Defendant will be able to

establish trademark rights for the California Job Board outside of the wine/hospitality industry in California.

89.   Defendant argues that the "commercial strength of the Canvas mark in the employment recruiting space is in fact attributable to Canvas and its predecessor in interest, not Instructure." Opp. at 20. This is beyond ridiculous. Instructure has been offering its Canvas ePortfolio expressly to showcase student's accomplishments to prospective employers since 2010. Instructure has spent tens of millions of dollars promoting this feature and purpose over the past decade. To accuse Instructure of infringement based on a geographically limited and little used mark that Defendant acquired solely for the purpose of claiming priority is absolutely appalling and would work an unfathomable injustice to Instructure.
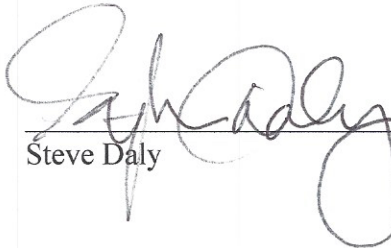
90.   Jobvite is also not operating in our space. Canvas by Jobvite is an intelligent text-based interviewing platform. See https://gocanvas.io/about. Canvas by Jobvite is an "enterprise-level" application (*id*.), which means that it is software to satisfy the needs of an organization rather than individual users. As contrasted to both Canvas ePortfolio and Defendant profiles, Canvas by Jobvite does not allow applicants to create an online eportfolio or profile that the individual student can then use to network or share with prospective employers. Rather, Canvas by jobvite allows candidates only to "text a picture of their resume" (*id*.) that the Jobvite application then uses for purposes of recruiters. Instructure has never enforced its trademark against Jobvite because its texting interviewing platform has no overlap with Canvas ePortfolio.

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I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Dated: September 16 , 2021

_____
Steve Daly

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of September, 2021, a true and correct copy of the

foregoing document was served on counsel of record via CM/ECF.

<div align="right">

/s/ Tamara L. Kapaloski
Tamar L. Kapaloski

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